

# **INTERNATIONAL FINANCE - SPRING 2013**

## **ASSET FREEZES AND MONEY LAUNDERING**

Caroline Bradley<sup>1</sup>

We have seen already that the US International Banking Act states that in making its decision as to whether to approve a foreign bank's establishment of a branch or an agency in the US the Federal Reserve Board shall "consider whether the foreign bank has adopted and implements procedures to combat money laundering" and "may also take into account whether the home country of the foreign bank is developing a legal regime to address money laundering or is participating in multilateral efforts to combat money laundering."<sup>2</sup> In addressing the financial crisis, the G20 countries agreed to work together to deal with money laundering.<sup>3</sup> At the international level the Financial Action Task Force promulgates standards on money laundering. Since 9/11 these standards also address the financing of terrorism. Governments use asset freezes as ways of preventing terrorism or as sanctions against other Governments. In recent years such asset freezes have often been co-ordinated at the international level through the United Nations Security Council. Financial institutions are required to implement anti-money-laundering (AML) measures and asset freezes as a condition of their licensing.

These materials address some issues relating to asset freezes, and we will also read the Financial Action Task Force's International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. These are among the standards which the G20 countries have committed to implement and which are the subject of IMF/World Bank FSAP reviews. Over time they have developed from focusing on money laundering as related to organized crime to addressing the financing of terrorism and the proliferation of weapons of mass destruction. In this area general issues relating to policing have an impact on the regulation of financial institutions. Financial institutions are co-opted as components of regimes of crime control and public security.

### **Asset Freezes and the UN Security Council**

In *Libyan Arab Foreign Bank v Bankers Trust* we saw that unilateral asset freezes can be problematic for banks required to implement them: a bank might find that the laws of one jurisdiction where it carries on business require it to act in ways which are inconsistent with the laws of another jurisdiction whose laws bind it. Multilateral freezes should be easier for banks

---

<sup>1</sup> Professor of Law, University of Miami School of Law, PO Box 248087, Coral Gables, FL, 33124, [cbradley@law.miami.edu](mailto:cbradley@law.miami.edu) ; <http://blenderlaw.umlaw.net/> . © Caroline Bradley 2013. All rights reserved.

<sup>2</sup> International Finance 3: Cross Border Financial Regulation, <http://blenderlaw.umlaw.net/wp-content/uploads/2012/11/intfinmats2013crossborderbanks.pdf> at p. 45.

<sup>3</sup> *See, e.g., id.* at p. 12.

with cross-border operations to manage, as they can avoid the problems Bankers Trust faced in the Libyan Arab Foreign Bank case. Multilateral sanctions are adopted by the United Nations Security Council.<sup>4</sup> To the extent that multilateral freezes can be made effective they also operate more effectively as sanctions or to inhibit the financing of terrorism. Some multilateral sanctions target countries, and others target named individuals. But individuals have no standing to challenge a decision by the Security Council to impose an asset freeze. The Security Council adopted resolution 1730 (2006)<sup>5</sup> to ask the UN Secretary-General to establish a “focal point” to consider requests for de-listing.<sup>6</sup>

Where the Security Council adopts sanctions, individual states may adopt unilateral sanctions as well. For example, the Security Council has adopted sanctions with respect to Iran which include embargos with respect to nuclear and conventional weapons and materiel and a travel ban and assets freeze for designated persons and entities.<sup>7</sup> The US has imposed additional unilateral sanctions with respect to Iran.<sup>8</sup>

**A 2012 Report by a Panel of Experts on the Multilateral Iran sanctions<sup>9</sup>** stated:

The sanctions measures specified in resolution 1929 (2010) and previous resolutions are part of a coordinated and intensive effort by the international community to persuade the Islamic Republic of Iran to resolve outstanding questions about the nature of its nuclear programme and demonstrate that it is for purely peaceful purposes. Sanctions remain one element of a dual-track approach to the country, which includes diplomatic efforts by China, France, Germany, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America. These sanctions are targeted at specific activities, institutions, entities and individuals related to the Islamic Republic of Iran’s prohibited proliferation-sensitive nuclear activities and development of a nuclear weapon delivery system, in addition to transfers of conventional weapons.

---

<sup>4</sup> See generally, e.g., <http://www.un.org/sc/committees/index.shtml>.

<sup>5</sup> See [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1730%282006%29](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1730%282006%29).

<sup>6</sup> There is a guide to the delisting process at <http://www.un.org/sc/committees/pdf/De-listing%20process%20flowchart.pdf>.

<sup>7</sup> See <http://www.un.org/sc/committees/1737/>.

<sup>8</sup> See, e.g., National Defense Authorization Act FY 2013.

<sup>9</sup> Final Report of the Panel of Experts submitted in accordance with resolution 1984 (2011) at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2012/395](http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/395).

Sanctions are slowing the procurement by the Islamic Republic of Iran of some critical items required for its prohibited nuclear programme. At the same time, prohibited activities, including uranium enrichment, are continuing. The Islamic Republic of Iran has still not complied with the requests of the International Atomic Energy Agency for information to clarify the possible military dimensions of its programme. In the present report, the Panel identifies the acquisition of high-grade carbon fibre as one of a number of critical items that the Islamic Republic of Iran requires for the development of more advanced centrifuges. The report also contains an analysis of the country's requirements for uranium ore in the context of its current and future planned activities, while noting that no procurement attempts have been reported to the Security Council Committee established pursuant to resolution 1737 (2006).

The Iranian ballistic missile programme continues to develop, as demonstrated by additional launches, their prohibition under resolution 1929 (2010) notwithstanding. In the present report, the Panel provides the conclusions of its investigation into the June 2011 launch of the Rasad satellite, which was reported to the Committee.

The Panel takes note of the recent designations by the Security Council Committee established pursuant to resolution 1718 (2006) concerning the Democratic People's Republic of Korea of two Democratic People's Republic of Korea entities and their links to the Iranian ballistic missile programme...

The Panel concludes that financial sanctions have been implemented by many Member States with rigour and welcomes the new Financial Action Task Force standard on financing of proliferation...

Security Council resolutions are targeted at specific activities, institutions, entities and individuals related to the Islamic Republic of Iran's prohibited nuclear and missile activities, and conventional arms imports and exports. It is difficult to assess their impact, in particular measured against stronger and more comprehensive sanctions imposed by Member States unilaterally.

Unilateral sanctions are an issue that Member States raise regularly with the Panel in the context of their implementation of targeted Security Council sanctions. A number of Member States, which implement only these sanctions, have expressed concern to the Panel that unilateral sanctions have a negative impact on legitimate economic activities allowed under United Nations sanctions...

#### Financial and business restrictions

The relevant Security Council resolutions contain two categories of financial restrictions. The first, targeted financial sanctions, require freezing of funds and other assets of designated entities and individuals (resolution 1737 (2006), paras. 12-15; resolution 1747 (2007), para. 6; resolution 1803 (2008), para. 7; and resolution 1929 (2010), paras. 11, 12 and 19). The designated individuals and entities are listed in the annex to resolution 1737 (2006), annex I to resolution 1747 (2007), annexes I and III to resolution 1803 (2008) and annexes I to III of resolution 1929 (2010). Two Iranian financial institutions are designated: Bank Sepah and Bank Sepah International (resolution 1747 (2007)) and First East Export Bank (resolution 1929 (2010)).

The second category of restriction is activity-based sanctions, which impose restrictions on financial or business dealings with the Islamic Republic of Iran under specific conditions. The restrictions are as follows:

- (a) Preventing the transfer of financial resources or services related to the supply, sale, transfer, manufacture or use of the prohibited items (resolution 1737 (2006), para. 6; and resolution 1929 (2010), paras. 8 and 13);
- (b) Preventing the provision of financial services and transfer of financial assets or resources that could contribute to the Islamic Republic of Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems (resolution 1929 (2010), para. 21);
- (c) Prohibiting Iranian banks from initiating new business activities in Member States if related to the Islamic Republic of Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems (resolution 1929 (2010), para. 23);
- (d) Prohibiting financial institutions of Member States from initiating new business in the Islamic Republic of Iran if related to the Islamic Republic of Iran's proliferation-sensitive nuclear activities, or the development of nuclear weapon delivery systems (resolution 1929 (2010), para. 24).

The activity-based sanctions of resolution 1929 (2010) build on those set out in resolutions 1737 (2006) and 1803 (2008). Two Iranian financial institutions are named in paragraph 10 of resolution 1803 (2008), in which the Security Council calls upon States to exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in the Islamic Republic of Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad. Vigilance over transactions involving Iranian banks, including the Central Bank of Iran, was also called for in the sixteenth preambular paragraph of resolution 1929 (2010).

Member States are also obliged to require their nationals, persons subject to their jurisdiction and firms incorporated in their territory or subject to their jurisdiction to exercise vigilance when doing business with entities in the Islamic Republic of Iran, including those of the Islamic Revolutionary Guards Corps and the Islamic Republic of Iran Shipping Lines (resolution 1929 (2010), para. 22).

To implement financial sanctions, Member States require mechanisms to identify and freeze assets of designated entities and individuals, and to monitor and regulate financial and business transactions with the Islamic Republic of Iran. A high standard of communication and coordination between regulatory authorities and the private sector is needed.

While many Member States noted that they had such systems in place, only a few shared information regarding suspicious transaction reports, violations or attempted violations. For example: (a) One State bordering the Islamic Republic of Iran said that it had revoked the licence of a money transfer company in 2008; (b) One State informed the Panel that its financial intelligence unit had received and investigated several suspicious transaction reports in connection with transactions involving Bank Saderat during the period 2006-2007. It could not be ascertained that those were relevant to United Nations resolutions. The financial intelligence unit had also carried out checks on the basis of information received from other Member States during 2007, but no information had been found related to United Nations sanctions; (c) One State said that on-site inspections of Bank Mellat had identified two examples of failure to follow proper procedures; (d) One State noted that transactions from banks in one Middle Eastern State with Iranian shareholders had been blocked based on intelligence received from foreign sources...

There is no general understanding of the definition of “vigilance” in the context of paragraph 22 of resolution 1929 (2010). Member States reported various mechanisms to comply with this requirement, such as: (a) Some regulatory authorities closely supervised business with the Islamic Republic of Iran; (b) Some authorities required notification or authorization in advance for transfers of funds involving an Iranian person or entity over specific thresholds. One State reported a requirement for non-personal financial transactions to be licensed on a case-by-case basis. Other Member States had systems in place to license individual financial transactions, or to license a class of financial transactions; (c) Some Member States reported that they simply generally supervised business to ensure that no prohibited activities took place...

The Panel received no reports that the Islamic Republic of Iran had successfully developed significant new channels for transactions following the adoption of resolution 1929 (2010), although some Member States shared information that it remained interested in doing so. One State noted that monitoring Iranian-related transactions through banks in some third countries was difficult. One State bordering the Islamic Republic of Iran informed the Panel of Iranian requests to open new financial institutions. Those requests were not pursued, apparently because of that State’s burdensome legislation. Another State, on another continent, disclosed similar requests. Another State said that the Islamic Republic of Iran had requested information about procedures for opening financial institutions using Iranian or mixed capital. In most cases, the Islamic Republic of Iran did not pursue these enquiries.

The compliance department of one large international financial institution stated that the Islamic Republic of Iran was known to be seeking to develop covert relationships with existing institutions, and new relationships in jurisdictions with weak regulations. A representative of another large international financial entity also noted that Iranian banks were creative in seeking to circumvent sanctions, including by opening new branches...

The Financial Action Task Force issued revised standards in February 2012, including a new standard on implementation of targeted financial sanctions related to proliferation. Member States may need to put in place mechanisms to meet this standard. The inclusion of this standard in future mutual evaluation reviews could provide the Panel with useful information regarding the implementation of United Nations targeted financial sanctions.

#### Responses to financial sanctions

Member States informed the Panel that Iranian entities and citizens not designated under sanctions were deploying measures to deal with the effects of sanctions, in particular unilateral ones, some of which might be intended only to protect legitimate transactions, such as: (a) An increasing number of Iranian-related financial transactions involved non-sanctioned Iranian banks with correspondent accounts with foreign banks, or money transfer businesses based in the Islamic Republic of Iran with access to foreign banks. Some of those transactions might have been initiated by sanctioned banks; (b) An increase in cash transfers between Iranians resident overseas and their friends and relatives inside the Islamic Republic of Iran, which was notable in Member States with many Iranian residents. One State, which monitors all cross-border financial transactions, reported a several-fold increase over the past two

years in cash transfers to the Islamic Republic of Iran. The State suggested that sanctions had made electronic transfers more difficult. Another factor was the increasing regulation of money transfer businesses, which were now required to register as financial institutions. The media also reported an increase in cash transactions; (c) One State said that hawala transactions had increased in recent years in inverse proportion to the reduction of bank transactions with the Islamic Republic of Iran; (d) One border State reported that barter transactions were a growing component of trade with the Islamic Republic of Iran. Barter arrangements were also reported by the media; (e) Some Member States reported cases of companies set up for the purpose of transferring funds to or from the Islamic Republic of Iran. For example, the Panel was informed of the case of a small non-financial firm led by an expatriate Iranian that had transformed itself into a company involved in transferring funds received from a non-sanctioned Iranian bank to recipients throughout the world. Some \$11 billion had been processed over 18 months. Understanding whether and how the above-described methods could be used for financing procurement for sanctioned nuclear and ballistic programmes is challenging. These programmes are industrial in scale and require sources of financing for procurement that are large and reliable.

#### Practices of financial entities

The Panel held discussions with representatives of several international financial institutions, insurers, banking associations and legal entities in Europe, Asia and North America.

For the purposes of implementing United Nations targeted sanctions, many large financial institutions said that they relied on commercial software providers for systems to screen transactions. Screening against individuals designated by the United Nations was often complicated by a lack of sufficient identifying detail.

Most institutions required screening to be able to identify possible non-compliance under all relevant jurisdictions in which they operated. Some providers offered screening services against additional, proprietary criteria. Most institutions said that they deployed many staff and expended significant resources to ensure that adequate due diligence was carried out.

The Panel was informed by many institutions and regulatory authorities that they took a highly risk-averse approach to compliance with sanctions on the Islamic Republic of Iran. Many regarded possible penalties for violating unilateral sanctions (in addition to negative publicity and reputational damage) as of greater concern than possible violations of United Nations sanctions, and formulated corporate compliance procedures accordingly. Some entities reported that they had decided that resources needed for adequate compliance with all relevant sanctions regimes were too costly where business was connected with the Islamic Republic of Iran and had decided to do no such business at all.

Channels for transactions with some Iranian banks have been blocked following the termination of financial messaging services to these banks in response to unilateral financial sanctions.

The Panel observed that the practices of many financial institutions were widening the scope of United Nations financial sanctions. For example, two large insurance entities informed the Panel that company policy was to turn down almost all business connected with the Islamic Republic of Iran because of the burdensome nature of necessary due diligence and potential complexities should a claim arise. Many

protection and indemnity clubs have terminated third-party liability cover for Iranian vessels because of unilateral sanctions. The Panel was informed that Iranian insurance companies might provide alternative cover. It is unclear whether the compliance policies of international banks would allow transactions to be processed should Iranian insurance companies pay out against a claim.

### Challenges

#### Asset freezes

Only a few Member States reported that assets had been frozen in response to Security Council resolutions. Most Member States informed the Panel that no assets had been frozen because no relevant assets had been present. Two said that business related to the Islamic Republic of Iran had already scaled back significantly by the time that United Nations asset freezes were put in place.

There are several possible reasons for the lack of reports of assets frozen under the relevant United Nations resolutions. Some Member States may lack mechanisms to freeze assets in connection with the resolutions, or may have failed to take action swiftly to ensure that no funds were removed from their jurisdiction before such freezes took effect. Some Member States may require assistance or advice in the implementation of asset freezes. For example, one State enquired about procedures followed elsewhere with regard to property subject to asset freezes.

A banking association reported to the Panel in writing that its members were concerned about the ability of the competent authorities to respond to enquiries and licensing requests in a timely manner. Many competent authorities struggled with the lack of precision in the language of United Nations resolutions (such as the definition of “acting on their behalf”).

#### Unilateral sanctions

The issue of unilateral financial sanctions is not within the Panel’s mandate. The issue is, however, raised often by Member States in the course of the Panel’s consultations regarding United Nations financial sanctions. In addition to United Nations sanctions on the Islamic Republic of Iran, a number of jurisdictions have imposed their own financial sanctions regimes (referred to here as “unilateral sanctions regimes”). Such regimes and sanctions have increased over the past year.

Some Member States reported that they sought to comply with both United Nations sanctions and unilateral regimes, and others that they complied only with United Nations sanctions.

One example of the difficulties imposed by unilateral sanctions on legitimate transactions is illustrated by an enquiry from an international humanitarian organization to the United Nations regarding the transfer of funds from the Islamic Republic of Iran. The Committee, assisted by the Panel, subsequently recommended that the humanitarian organization should seek advice from Member States that had jurisdiction over their activities regarding restrictions imposed by sanctions regimes, and, where necessary, request such Member States to seek an exemption from the Committee in connection with the transfer of items, financial resources or assets to or from the Islamic Republic of Iran.

One State reported that it had been approached by an international humanitarian organization for advice on transferring funds to the Islamic Republic of Iran following the imposition of unilateral sanctions. The State responded that it could not influence the policies of individual banks.

The media also reported difficulties with humanitarian transactions.

#### Conclusions

The Panel finds a high level of awareness among Member States and the private sector of United Nations financial sanctions. Many Member States are implementing sanctions through their financial regulatory bodies with rigour.

Understanding whether and how Iranian circumvention of United Nations financial sanctions could be used for financing procurement for sanctioned nuclear and ballistic missile programmes is challenging. These programmes are industrial in scale and require sources of procurement financing that are large and reliable.

Legitimate trade may be hindered by the practices for financial transactions followed by some entities in response to unilateral sanctions.

As mentioned above, people designated on the basis of Security Council resolutions have no right to challenge the designations directly in any tribunal: there is no individual standing to challenge acts of the UN Security Council. But the Security Council resolutions are implemented by means of domestic measures in UN Member States (and in the EU by EU institutions and the Member States). Courts in the EU have found that persons designated under UN sanctions regimes have rights to due process under EU law, which they can invoke before EU courts and the domestic courts of EU Member States.

A recent opinion of Advocate General Bot in **Commission v Yassin Abdullah Kadi**<sup>10</sup> describes some of the background to the EU courts' approach to these cases. The opinion is part of the procedure in cases before the EU's courts; it does not have the legal effect of a judgment of a court, but such opinions may be followed by the EU courts.

1. In its judgment of 3 September 2008 in *Kadi and Al Barakaat International Foundation v Council and Commission*, the Court held that the European Union ('EU') judicature must ensure the review, in principle a full review, of the lawfulness of acts of the EU institutions which give effect to the resolutions of the United Nations Security Council providing for the freezing of the assets of persons and entities identified by the Security Council Sanctions Committee on a consolidated list.
2. The present cases call for the Court to clarify the scope and the nature of that review.
3. The difficulty faced by the Court here stems from the challenge represented by the problem raised, namely the globally coordinated prevention of terrorism.
4. I have already pointed out, in the context of another case, the specific features of the fight against

---

<sup>10</sup> See <http://www.bailii.org/eu/cases/EUECJ/2013/C58410.html> .



terrorism.

5. Terrorism is a criminal activity which has a totalitarian inspiration, which denies the principle of individual freedom and whose aim is to seize political, economic and judicial powers in a given society in order to entrench there its underlying ideology. The unpredictability and the devastating impact of terrorist acts committed require the public authorities to develop all conceivable means of prevention. Accordingly, protection of intelligence assets and sources is an absolute priority. It must make it possible to evaluate the degree of potential threat, to which a prevention measure commensurate with the identified threat must respond. This calls for a highly flexible approach, because of the multi-faceted character of the situation on the ground. The conditions underlying the threat and the fight against it may be different depending on time and place, and the genuineness and the level of the threat may vary with changes in global geopolitical conditions.

6. Nevertheless, the fight against terrorism cannot lead democracies to abandon or deny their founding principles, which include the rule of law. However, it does cause them to make the changes to them that the preservation of the rule of law requires.

7. The measures decided on by the Security Council and the evaluations conducted by the Sanctions Committee regarding the existence of a terrorist threat likely to undermine international peace and security play a key role in combating international terrorism.

8. Consequently, in defining the extent and the intensity of its review of the lawfulness of EU acts giving effect to resolutions of the Security Council, the EU judicature must take account of the primary responsibility held by that international body in maintaining peace and security at global level.

9. In this Opinion, I shall first explain why, in my view, it would be wrong for the Court to reverse its decision not to grant immunity from jurisdiction to regulations giving effect to Security Council resolutions.

10. I shall then explain what should, in my view, be the extent and the intensity of the review of such regulations performed by the EU judicature. After highlighting the various arguments against the view taken by the General Court of the European Union in its judgment of 30 September 2010 in *Kadi v Commission*, I shall advocate a normal review of the external lawfulness and a limited review of the internal lawfulness of those regulations.

11. Finally, I shall draw the conclusions from the standard of judicial review thus defined for the protected content of the fundamental rights invoked by Mr Kadi.

#### I – The appeals

12. By their appeals, the European Commission (Case C-584/10 P), the Council of the European Union (Case C-593/10 P) and the United Kingdom of Great Britain and Northern Ireland (Case C-595/10 P) are seeking to have set aside the judgment under appeal, by which the General Court annulled Commission Regulation (EC) No 1190/2008 of 28 November 2008, in so far as that measure concerns Mr Kadi. The Commission, the Council and the United Kingdom also claim that the Court should dismiss Mr Kadi's application for the annulment of the contested regulation in so far as it concerns him.

13. The Commission, the Council and the United Kingdom put forward differing grounds in support of their respective appeals. There are, in essence, three. The first ground alleges an error of law in that the judgment under appeal failed to afford the contested regulation immunity from jurisdiction. The second alleges errors of law with regard to the level of intensity of judicial review determined in the judgment under appeal. The third alleges that the General Court erred in its examination of Mr Kadi's pleas in respect of infringement of his rights of defence and his right to effective judicial protection, and in respect of infringement of the principle of proportionality.

14. Before commencing the examination of the appeals, I will briefly describe the judgment of the Court of Justice in Kadi, its repercussions, and the judgment under appeal.

II – The judgment of the Court of Justice in Kadi and its repercussions

15. By its judgment in Kadi, the Court of Justice set aside the judgment of the General Court of 21 September 2005 in Kadi v Council and Commission and annulled Regulation No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, in so far as it concerned Mr Kadi.

16. In essence, the Court held that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all EU acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by that Treaty. It held further that, notwithstanding the fact that undertakings given in the context of the United Nations must be treated as binding when Security Council resolutions are implemented, it is not a consequence of the principles governing the international legal order under the United Nations that an act adopted by the European Union, such as Regulation No 881/2002, enjoys immunity from jurisdiction. It added that such immunity cannot find a basis in the EC Treaty.

17. In those circumstances the Court of Justice held that the EU judicature must ensure the review, in principle a full review, of the lawfulness of all EU acts in the light of fundamental rights, including the review of measures which are designed to give effect to Security Council resolutions, and that the General Court's reasoning was therefore vitiated by an error of law.

18. Adjudicating on the action brought by Mr Kadi in the General Court, it held that, because the Council neither communicated to Mr Kadi the evidence used against him to justify the restrictive measures which had been imposed on him nor afforded him the right to be informed of that evidence within a reasonable period after those measures were enacted, Mr Kadi had not had the opportunity to make his point of view in that respect known to advantage. In those circumstances, it found that Mr Kadi's rights of defence and his right to effective judicial review had been infringed and that there was an unjustified restriction on his right to property. The effects of the annulled regulation in so far as it concerned Mr Kadi were maintained for a maximum period of three months in order to allow the Council to remedy the

infringements found.

19. The repercussions of that judgment of the Court of Justice in so far as it concerned Mr Kadi may be summarised as follows.

20. On 21 October 2008, the Chairman of the Sanctions Committee communicated the summary of reasons for Mr Kadi's inclusion in the list to France's Permanent Representative to the UN and authorised its transmission to Mr Kadi. ...

21. On 22 October 2008, France's Permanent Representative to the European Union transmitted that summary of reasons to the Commission, which sent it to Mr Kadi on the same day, informing him that, for the reasons set out in that summary, it envisaged maintaining his listing in Annex I to Regulation No 881/2002. The Commission gave Mr Kadi until 10 November 2008 to comment on those reasons and to provide it with any information that he might consider relevant before it took its final decision.

22. On 10 November 2008, Mr Kadi submitted his comments to the Commission, requesting disclosure of the evidence supporting the assertions and allegations made in the summary of reasons and also the relevant documents in the Commission's file, and requesting a further opportunity to make representations on that evidence, once he had received it. He also attempted to refute, providing evidence in support of his refutation, the allegations made in the summary of reasons, in so far as he was able to respond to general allegations.

23. On 28 November 2008, the Commission adopted the contested regulation.

24. Recitals 3 to 6, 8 and 9 in the preamble to the contested regulation read as follows: '(3) In order to comply with the judgment of the Court of Justice [in Kadi], the Commission has communicated the ... [summary] of reasons ... to Mr Kadi ... and given [him] the opportunity to comment on these grounds in order to make [his] point of view known. (4) The Commission has received comments by Mr Kadi ... and [has] examined these comments.(5) The list of persons, groups and entities to whom the freezing of funds and economic resources should apply, drawn up by [the Sanctions Committee], includes Mr Kadi ...(6) After having carefully considered the comments received from Mr Kadi in a letter dated 10 November 2008, and given the preventative nature of the freezing of funds and economic resources, the Commission considers that the listing of Mr Kadi is justified for reasons of his association with the Al-Qaeda network. ... (8) In view of this, Mr Kadi ... should be added to Annex I. (9) This Regulation should apply from 30 May 2002, given the preventative nature and objectives of the freezing of funds and economic resources under Regulation ... No 881/2002 and the need to protect legitimate interests of the economic operators, who have been relying on the legality of [the regulation annulled by the judgment of the Court of Justice in Kadi].'

25. Under Article 1 and the Annex to the contested regulation, Annex I of Regulation No 881/2002 was amended, inter alia, to the effect that the following entry was added under the heading 'Natural persons': 'Yasin Abdullah Ezzedine Qadi (alias (a) Kadi, Shaykh Yassin Abdullah; (b) Kahdi, Yasin; (c) Yasin Al-Qadi). Date of birth: 23.2.1955. Place of birth: Cairo, Egypt. Nationality: Saudi Arabian. Passport No: (a) B 751550, (b) E 976177 (issued on 6.3.2004, expiring on 11.1.2009). Other information: Jeddah, Saudi Arabia.'

26. The contested regulation, in accordance with Article 2 thereof, entered into force on 3 December 2008 and applied from 30 May 2002.

27. By letter of 8 December 2008, the Commission replied to Mr Kadi's comments of 10 November 2008, essentially stating:

- in providing him with the summary of reasons and inviting him to comment on them, the Commission had complied with the judgment of the Court of Justice in Kadi;
- the judgment of the Court of Justice in Kadi did not require that the Commission disclose the further evidence requested;
- as the relevant Security Council resolutions required 'preventative' asset freezing, the freezing must be supported, with respect to the requisite evidentiary standard, by 'reasonable grounds, or a reasonable basis, to suspect or believe that the individual or entity designated is a terrorist, one who finances terrorism or a terrorist organisation';
- the letter from Mr Kadi confirmed his participation in the decisions and activities of the Muwafaq Foundation and his links with Mr Ayadi, who was part of a contact network with Usama bin Laden, and
- the dropping of the criminal proceedings against Mr Kadi in Switzerland, Turkey and Albania had no bearing on the relevance of his inclusion on the list drawn up by the Sanctions Committee, which may be based on information from other United Nations Member States. In addition, those decisions to drop proceedings were taken within the framework of criminal proceedings, which have different standards of evidence from those applicable to Sanctions Committee decisions, which are preventative in nature.

28. The Commission concluded that the inclusion of Mr Kadi in the list annexed to Regulation No 881/2002 was justified by his association with the Al-Qaeda network. It enclosed with its letter a statement of reasons identical to the summary of reasons previously sent to Mr Kadi, together with the text of the contested regulation, drawing attention to the possibility for him to challenge that regulation before the General Court and to submit at any time a request to the Sanctions Committee to have his name removed from the list.

### III – The judgment under appeal

29. By application lodged at the General Court on 26 February 2009, Mr Kadi brought an action for annulment of the contested regulation in so far as it concerned him. In support of his claims, he put forward five pleas in law. The second plea alleged breach of the rights of the defence and of the right to effective judicial protection, and the fifth plea alleged breach of the principle of proportionality.

30. In the judgment under appeal, the General Court stated.. that, in the light of.. the judgment of the Court of Justice in Kadi and in circumstances such as those of that case, its task is to ensure the review, 'in principle the full review', of the lawfulness of the contested regulation in the light of fundamental rights, without affording that regulation any immunity from jurisdiction on the ground that it gives effect to Security Council resolutions... it added that, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection, as the Court of Justice considered to be the case... the review carried out by the EU judicature of EU measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the

Sanctions Committee itself and the evidence underlying them.

31. The argument of the Commission and the Council concerning the Court of Justice's failure to make a determination, in its judgment in *Kadi*, on the extent and intensity of the judicial review was held, in ..the judgment under appeal, to be clearly wrong. The General Court held in essence ... that it is apparent from ... the judgment of the Court of Justice in *Kadi* that the Court of Justice intended that its review, 'in principle [a] full review', should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in that measure are based.

32. It added ... that, by taking on the essential content of the General Court's reasoning in the judgment in *Organisation des Modjahedines du peuple d'Iran v Council*, the Court of Justice approved and endorsed the standard and intensity of the review as carried out by the General Court in that judgment and it was therefore necessary to apply to the present context the principles set out by the General Court in that judgment and in its subsequent decisions concerning the EU's 'autonomous' system of sanctions.

33. The General Court continued with some supplementary considerations based on the nature and effects of the contested fund-freezing measures on those subjected to them, viewed from a temporal perspective. In that regard... it asked whether 'given that now nearly 10 years have passed since the applicant's funds were originally frozen – it is not time to call into question the finding of this Court... according to which the freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof'.

34. The General Court concluded in.. the judgment under appeal that 'once there is acceptance of the premiss, laid down by the judgment of the Court of Justice in *Kadi*, that freezing measures such as those at issue in this instance enjoy no immunity from jurisdiction merely because they are intended to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned'.

35. Going on to examine the second and fifth pleas for annulment in the light of these various preliminary observations, it held... that:

- those rights were observed only in the most formal and superficial sense, as the Commission considered itself strictly bound by the Sanctions Committee's findings and therefore at no time envisaged calling those findings into question in the light of Mr *Kadi*'s comments or taking due account of his comments;
- the Commission refused Mr *Kadi* access to the evidence against him despite his express request, whilst no balance was struck between his interests, on the one hand, and the need to protect the confidential nature of the information in question, on the other, and
- the few pieces of information and the imprecise allegations in the summary of reasons, such as the claim that Mr *Kadi* was a shareholder in a Bosnian bank in which planning sessions against a United States facility in Saudi Arabia 'may have' taken place, were clearly insufficient to enable the applicant to

launch an effective challenge to the allegations against him.

36. The General Court therefore held... that it was clear that Mr Kadi was not in a position to mount an effective challenge to any of the allegations against him, given that all that was disclosed to him was the summary of reasons. After noting ...that the Commission had made no real effort to refute the exculpatory evidence advanced by Mr Kadi, it concluded... that the contested regulation was adopted in breach of Mr Kadi's rights of defence.... it added.. that the fact that Mr Kadi had an opportunity to be heard by the Sanctions Committee with a view to him being removed from its list clearly did not remedy that breach.

37. ...the General Court ruled... that given the lack of any proper access to the information and evidence used against him, Mr Kadi was also unable to defend his rights with regard to that evidence in satisfactory conditions before the Union judicature and that that infringement of the right to effective judicial protection had not been remedied in the course of this action before the General Court, as no evidence had been adduced in the course of that action by the institutions concerned. Stating that it was not able to review the lawfulness of the contested regulation, the General Court concluded... that Mr Kadi's fundamental right to effective judicial review had not, in the circumstances, been observed. Taking the view that the contested regulation was adopted in breach of the rights of the defence, it found an infringement of the principle of effective judicial protection....

40. ...the General Court held ... that since the contested regulation was adopted without enabling Mr Kadi to put his case to the competent authorities despite the significant restriction of his property rights represented by the freezing measures to which he was subject, having regard to their general application and duration, the imposition of such measures constituted an unjustified restriction of that right. Mr Kadi's claim that the infringement by that regulation of his fundamental right to respect for property entailed a breach of the principle of proportionality was well founded.

41. The General Court therefore annulled the contested regulation in so far as it concerned Mr Kadi.

42. It should be pointed out that on 5 October 2012 the Sanctions Committee decided to delist Mr Kadi after considering his delisting request and the report produced by the Ombudsperson. Mr Kadi's name was therefore deleted from Annex I to Regulation No 881/2002. That deletion, which took place after the present appeals were lodged, does not, in my view, remove the interest in bringing proceedings on the part of the Commission, the Council and the United Kingdom or that of Mr Kadi in the context of his application for annulment.

43. It is now necessary to assess the reasoning adopted by the General Court, examining in turn three issues, namely the absence of immunity from jurisdiction of the contested regulation, the extent and intensity of judicial review in the context of the present cases and, lastly, the protected content of the fundamental rights invoked in this case by Mr Kadi.

#### IV – The absence of immunity from jurisdiction of the contested regulation

44. This first ground is put forward by the Council as its main ground of appeal. The Council, supported by the Kingdom of Spain, Ireland and the Italian Republic, complains that the General Court erred in law

by refusing... in line with the judgment of the Court of Justice in Kadi, to afford the contested regulation immunity from jurisdiction.

45. The Council and Ireland formally request this Court to reconsider the principles set out in that regard in its judgment in Kadi. Ireland contends that the issue of the contested regulation not enjoying immunity from jurisdiction has not been finally decided, since neither that regulation nor the procedure followed by its author prior to its adoption are the same as those involved in the case culminating in the judgment of the Court of Justice in Kadi. The Council and Ireland add that there have been instances where this Court has departed from the principles set out in its previous judgments.

46. In my view, the Court should not alter its refusal, in its judgment in Kadi, to afford an EU act such as the contested regulation immunity from jurisdiction.

47. I would point out that the policy of refusing to afford immunity from jurisdiction to EU acts giving effect to restrictive measures decided at international level is not an isolated one in the case-law of the Court, which has confirmed it in *Hassan and Ayadi v Council and Commission* and *Bank Melli Iran v Council*.

48. The Court thus held .... citing the judgment of the Court of Justice in Kadi, that ‘without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement that the Community institutions should pay due regard to the institutions of the United Nations could not result in their abstaining from reviewing the lawfulness of Community measures in the light of the fundamental rights forming an integral part of the general principles of Community law’.

49. As regards the merits of this policy, I cannot see any reason to take the view that the EU judicature should suspend its function where it is asked to rule on the lawfulness of a regulation such as the one at issue in the present cases. I therefore endorse the many arguments put forward by the Court in its judgment in Kadi to justify its refusal to afford immunity from jurisdiction to regulations which give effect within the European Union to restrictive measures adopted at United Nations level, such as the freezing of the funds in question. Those arguments essentially relate to the ‘constitutional’ guarantee embodied, in a Union based on the rule of law, by the judicial review of the conformity of any EU act, including an act which gives effect to an act of international law, with the fundamental rights enshrined in EU law, to the compatibility of such review with the principles governing the relationship between the international legal order under the United Nations and the EU legal order, and the lack of a foundation, in the treaties on which the European Union is based, for immunity from jurisdiction of acts such as the contested regulation.

50. In short, the Court took the view that, even where the EU institutions have a limited freedom of action in giving effect to international law, they are required to respect fundamental rights. It could only confirm its capacity to review respect for the fundamental rights of persons on the Sanctions Committee’s list, whilst acknowledging that in certain cases fundamental rights can be infringed where the institutions of the Union give effect to international law. Any other solution would have been in sharp contrast with the Court’s settled case-law, which seeks to ensure general protection of fundamental rights where an EU measure is under consideration by it.

51. As is shown by the other pleas raised in the present appeals, the subject-matter of the debate is no longer whether judicial review is possible but the conditions for that review. By taking account of the context in which Mr Kadi's assets were frozen in order to modulate the review by the EU judicature it is possible to defuse, to a large extent, the criticisms which have sometimes been levelled at the position of principle taken by the Court in its judgment in Kadi.

52. The respect which the European Union must pay to the binding rules of international law does not therefore have to be reflected in immunity from jurisdiction for the contested act but in an adaptation of the judicial review conducted. Consequently, I consider that the Court's confirmation of its role in the protection of the fundamental rights of persons on the Sanctions Committee's list must be subject to the clarifications that are necessary as regards the extent and the intensity of the review to be conducted by the EU judicature of the EU acts giving effect to those lists.

V – The extent and the intensity of the judicial review

A – The errors in law committed by the General Court in defining the applicable standard of review

53. Like the Commission, the Council, the United Kingdom and all the intervening governments, I consider that the General Court committed several errors in law in defining the characteristics and the standard of review which the EU judicature should perform in the context of restrictive measures such as the freezing of Mr Kadi's assets.

54. In the judgment under appeal, the General Court rejected the view taken by the Commission, the Council and the intervening governments which advocated limiting the judicial review of EU acts transposing within the Union the list of persons and entities identified by the Sanctions Committee whose assets must be frozen. Those parties essentially called on the General Court not to substitute its own assessment for that of the Sanctions Committee. More precisely, the Commission took the view that the General Court should merely consider, first, whether the applicant was effectively given the right to be heard and, second, whether the Commission's assessment of the applicant's comments appears to be unreasonable or vitiated by a manifest error.

55. The General Court held that if the review were limited in that way 'there would be no effective judicial review of the kind required by the Court of Justice in Kadi, but rather a simulacrum thereof'. It added that '[t]hat would amount, in fact, to following the same approach as that taken by this Court in its own judgment in Kadi'.

56. That initial assessment by the General Court, which formed the basis for the rest of its reasoning, seems to me to be fundamentally incorrect. The underlying assumption is that the Court took a clear position in its judgment in Kadi in favour of an intensive judicial review of the justification for listing Mr Kadi. The view taken by the General Court is also incorrect in so far as it treats a limited judicial review as equivalent to no review.

57. Later on in its judgment, the General Court clarified its reasoning, stating that 'the review carried out by the Community judicature of Community measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence



underlying them'. The General Court also took the view that 'the Court of Justice intended that its review, "in principle [a] full review", should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in the measure are based'. I consider that, in doing so, the General Court made the judgment of the Court of Justice in Kadi say something that it does not say.

58. To understand properly the significance of the Court's reference to what it termed, 'in principle [a] full review', of EU acts which are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, it should be borne in mind that, in using that wording, the Court sought to respond to the view put forward by the General Court in its judgment in Kadi I, which consisted in excluding any review of such EU acts in the light of fundamental rights protected by EU law.

59. The Court's use of the expression, 'in principle [a] full review', is therefore intended to emphasise the fact that the judicial review extends to all EU acts, whether or not they are adopted pursuant to a rule of international law, and that the review concerns both the external lawfulness of those acts and their internal lawfulness in the light of fundamental rights protected by EU law. On the basis of that statement of principle, this Court rejected the General Court's position that the contested regulation had to 'enjoy immunity from jurisdiction so far as concerns its internal lawfulness save with regard to its compatibility with the norms of jus cogens'.

60. Whilst one might therefore infer from this Court's use of the expression, 'in principle [a] full review' an indication as to the extent of the judicial review of the contested regulation which it intends to conduct, it is, in my view, too much to state that, in using that wording, the Court has taken a clear position on the level of intensity of that review. In its judgment in Kadi, the Court did not take an explicit stance in favour of an intensive review of the justification for listing Mr Kadi, which would require a rigorous examination of the evidence and information on which the assessment by the Sanctions Committee was based.

61. The expression 'in principle [a] full review' and, more specifically, the use of the words 'in principle' ('en principe') where the Court of Justice has placed them, appears to suggest an interpretation which is precisely the opposite of the one adopted by the General Court. If the Court of Justice had wished to express the idea that, from the point of view of its intensity, its review had to be full, without any exceptions, the use of the words 'in principle' was pointless. If it had wished to stress that it intended to establish an absolute principle, it should have used the expression 'on principle the full review' ('par principe complet'). The true position is that, in three words [in French], the Court expressed clearly and concisely the idea that its review, however broad it is, is full only in principle and that there are therefore possible exceptions. If there is an area in which an exception is appropriate, it is, for the reasons set out above, in the area of the fight against terrorism, which includes prevention, seen from the perspective of global coordination.

62. Whilst this Court has certainly accepted the principle of a review of the internal lawfulness of EU acts which are designed to give effect to the resolutions adopted by the Security Council under Chapter

VII of the Charter of the United Nations, it has not specified the conditions for such a review. In this regard, contrary to the claim made by the General Court... the statement by the Court of Justice in ...Kadi, that it must be possible to apply judicial review to the lawfulness of the grounds on which the contested EU measure is founded does not imply an intensive review by it of the justification for that act on the basis of the evidence in support of the factual and legal grounds cited.

63. It is also wrong, in my view, to take the view adopted by the General Court ... that, in its judgment in Kadi, the Court of Justice ‘approved and endorsed the standard and intensity of the review as carried out by the General Court in OMPI’. The judgment of the Court of Justice in Kadi does not make any reference to that judgment. Furthermore, the reasoning by the General Court in favour of harmonising the standards of judicial review in the two parts of the proceedings concerning asset freezing measures appears to be inconsistent with the finding made by the General Court itself of ‘marked procedural differences between the two Community regimes used for the freezing of funds’.

64. Moreover, in substance, at the very least on account of the difference in the nature of the two asset freezing regimes, I do not think that the standard of review established by the General Court in the case-law following the judgment in OMPI should be applied in the context of the listing regime decided by the Sanctions Committee. According to that case-law, although the General Court recognises that the competent EU institution possesses some latitude, ‘that does not mean that [the General Court] is not to review the interpretation made by that institution of the relevant facts’. According to the General Court, the EU judicature ‘must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it’. The General Court stated, however, that ‘it is not its task to substitute its own assessment of what is appropriate for that of the competent Community institution’.

65. The standard of review thus outlined by the General Court is characterised by the fact that ‘the judicial review of the lawfulness of a Community decision to freeze funds extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based’.

66. Even though I shall not be examining here the relevance of such a standard of review in connection with the regime of autonomous asset freezing lists, it should be noted that the application to the fight against terrorism of the case-law according to which complex economic assessments may give rise to a relatively thorough review by the EU judicature is far from obvious, in my view. Should intelligence analyses and sources be subject to the EU courts? Furthermore, to adopt such a standard of review would, it seems, be to forget that inclusion on an autonomous list is based largely on the assessment made by the competent national authorities of the existence, the reliability and the sufficiency of evidence or serious and credible clues of the involvement of the person concerned in terrorist activities. The question would therefore have to be raised whether, in a system based largely on the confidence which the EU institutions place in the evaluation conducted by the competent national authorities of the seriousness of the evidence or clues to support a freezing measure, an intensive review of that evidence by the EU

judicature is in fact appropriate.

67. Whatever the case, as regards the implementation of restrictive measures decided by the Sanctions Committee, there are several reasons against a judicial review as thorough as that undertaken by the General Court in the judgment under appeal, with reference to its judgment in OMPI. Those reasons relate to the preventative nature of the measures in question, the international context of the contested act, the need to balance the requirements of combating terrorism and the requirements of protection of fundamental rights, the political nature of the assessments made by the Sanctions Committee in deciding to list a person or an entity, and the improvements in the procedure before that body in recent years and, in particular, since the judgment of the Court of Justice in Kadi. I shall examine these arguments in turn.

68. First of all, it should be borne in mind that this Court has ruled, consistently and even recently, that freezing measures constitute temporary precautionary measures which do not deprive the persons concerned of their property. The funds are therefore frozen as a precautionary measure, but have not been confiscated. Such measures do not constitute criminal sanctions. Nor, likewise, do they imply any accusation of a criminal nature. They are intended to prevent new terrorist acts being committed and the significant repercussions they can have on the designated persons and entities are inherent in that preventative function. The financing of terrorism employs such diffuse, complicated and concealed channels that its prevention requires action to be taken at a very early stage, very peripheral to any specific criminal activity. In fact, prevention must seek to paralyse an entire set of networks, with all that the term means. The existence of such restrictive measures thus acts as a deterrent on possible suppliers of funds, who know that they may suffer very serious consequences if they support terrorist organisations. Even though their duration may be long (why should prevention be any shorter than the threat?), the important point is that the measure and its duration can be subject to a judicial review once again tailored to the specific character of the measure. Furthermore, it should be noted that measures of this kind may be limited in time, as is shown, moreover, by the case of Mr Kadi. Accordingly, the General Court erred in law in relying ... on a possible questioning of the preventative nature of freezing measures in order to advocate an intensive judicial review of such measures.

69. Second, in its judgment in Kadi, the Court of Justice held that ‘the European [Union] must respect international law in the exercise of its powers’. It explained that ‘[o]bservance of the undertakings given in the context of the United Nations is required ... in the sphere of the maintenance of international peace and security, when the [Union] gives effect ... to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations’. It also stressed the fact that, ‘[i]n the exercise of that latter power it is necessary for the [Union] to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them’. Lastly, this Court stated that, in drawing up measures to give effect to a resolution adopted by the Security

Council under Chapter VII of the Charter of the United Nations, the Union must ‘take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation’.

70. Whilst these observations cannot exclude the review by the EU judicature of the lawfulness of an EU act giving effect to a resolution of the Security Council, as the Court ruled ... in *Kadi*, they do, in my view, strengthen the case for tailoring the judicial review conducted according to the international context of the Union’s action.

71. That context is characterised here by the primary responsibility held by the Security Council for the maintenance of international peace and security, which, in principle, prevents the EU institutions and judicature from substituting their own assessment regarding the merits of restrictive measures decided within that body. An intensive judicial review, such as that advocated by the General Court in the judgment under appeal, cannot be performed without encroaching on the prerogatives of the Security Council in defining what constitutes a threat to international peace and security and the measures necessary to eradicate that threat. Since it is for the Sanctions Committee to decide to include a person or an entity on the list, the judicial review conducted within the European Union must be commensurate with the limited discretion enjoyed by the EU institutions. In other words, the primary responsibility held by the Security Council in the area in question must not be undermined and the Union must not be made a forum for appeals against or reviews of decisions taken by the Sanctions Committee.

72. Several provisions of the EU Treaty and of the FEU Treaty also militate in favour of limiting the judicial review in such a context.

73. Thus, under Article 3(5) TEU, the Union must ‘contribute to peace, security, ... the protection of human rights, ... as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter’. Furthermore, under Article 21(1) TEU, the Union’s action on the international scene is to be guided, *inter alia*, by ‘respect for the principles of the United Nations Charter and international law’. That provision also stipulates that the Union must ‘promote multilateral solutions to common problems, in particular in the framework of the United Nations’. Mention must also be made of Article 21(2)(c) TEU, which provides that the Union must work for a high degree of cooperation in all fields of international relations in order to ‘preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter ...’. Lastly, Declaration No 13 adds that ‘[the Conference] stresses that the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security’.

74. These provisions lay the foundations for action by the Union in the field of the common foreign and security policy which has due regard to the action undertaken by the United Nations.

75. In defining the extent and the intensity of its review, the Court must take account of the origin and the context of the EU act it is reviewing. In this instance, the Court cannot ignore the fact that inclusion on the list is decided on the basis of a centralised, universal procedure at the level of the United Nations or

that such a decision is based on a summary of reasons drawn up by the Sanctions Committee on the basis of information or evidence which is provided to it by the State(s) which made the listing request, in most cases in confidence, and which is not intended to be made available to the EU institutions.

76. Consequently, the most effective way, in my view, to balance the objective of combating terrorism and optimum protection of the fundamental rights of listed persons, in the spirit of the abovementioned Treaty provisions, is to develop cooperation between the Union and the United Nations in the area in question. It should be noted in this regard that Article 220(1) TFEU provides that '[t]he Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies ...'. It follows that the affirmation of the autonomy of the EU legal order which, in the judgment of the Court of Justice in *Kadi*, justified the Court's refusal to afford immunity from jurisdiction to EU acts giving effect to decisions of the Sanctions Committee is not, in my view, antithetical to the development of closer cooperation with that body. Moreover, in its judgment in *Parliament v Council*, the Court stated that Common Position 2002/402, Regulation No 881/2002 and Regulation No 1286/2009 established a 'system of interaction between the Security Council and the Union'.

77. Third, in its judgment in *Kadi*, after stating that 'overriding considerations to do with safety or the conduct of the international relations of the [Union] and of its Member States may militate against the communication of certain matters to the persons concerned', the Court held that the EU judicature must contribute to the necessary balance between the fight against terrorism and protection of fundamental rights. It is thus its task 'to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice'. In my view, one of these techniques is for the EU judicature to modulate the intensity of its review in the light of the context in which the contested EU act finds itself.

78. Fourth, as the Commission and the intervening governments emphasised at first instance, the power to decide that a person is associated with Al-Qaeda and that it is therefore necessary to freeze his assets in order to prevent him from financing or preparing acts of terrorism has been vested in the Security Council and it is difficult to conceive of a more important and more complex policy area which involves assessments concerning the protection of international security.

79. Asset freezing lists are part of a policy to prevent the international terrorist threat. The objective of measures freezing the funds of designated persons 'is to stop those persons having access to economic or financial resources, whatever their nature, that they could use to support their terrorist activities'.

80. As regards the list drawn up by the Sanctions Committee, it is true that listing is based on evidence indicating how the conduct of a person or an entity has a link with a terrorist organisation and therefore constitutes a threat to international peace and security, but it also has regard more generally to strategic and geopolitical interests. In this regard, the choice of the persons to be listed must be modified as the threat changes and must reflect the desire to fight against one or another terrorist organisation located in one or another region of the world. Listings are thus part of a political process which goes beyond any

individual case. Despite its targeted nature which gives it a personal dimension, this asset freezing regime is, above all, a way to combat terrorist organisations, to weaken and even dismantle them. In my view, the political dimension of this process in which the Union has decided to participate calls for moderation in the performance of the judicial review by the EU judicature, that is to say, it must not, in principle, substitute its own assessment for that of the competent political authorities.

81. Fifth, the improvements in the procedure before the Sanctions Committee since 2008 also militate in favour of a limited review of the internal lawfulness of the contested regulation by the EU judicature. Whether account is taken, in the context of the present appeals, only of the changes made before the contested regulation or whether those which have been made since then are also to be examined, it is indisputable that the United Nations has embarked on a process of improvement in the listing and delisting procedures in terms of equity and respect for the rights of the defence, with the adoption by the Security Council of Resolutions 1822 (2008) of 30 June 2008, 1904 (2009) of 17 December 2009 and 1989 (2011) of 17 June 2011.

82. This process reflects a realisation within the United Nations that, despite confidentiality requirements, the listing and delisting procedures must now be implemented on the basis of a sufficient level of information, that the communication of that information to the person concerned must be encouraged, and that the statement of reasons must be adequately substantiated. The Ombudsperson, who performs her functions in complete independence and impartiality, plays a significant role in this regard. She gathers the information needed for her assessment from the States concerned, she initiates a dialogue with the petitioner on that basis, and she then makes her proposals to the Sanctions Committee as to whether or not it is necessary to keep a person or an entity on the list. In the delisting procedure, the Sanctions Committee thus takes its decisions on the basis of an independent and impartial evaluation of whether or not it is necessary to keep the persons concerned on the list. The rigorous examination carried out by the Ombudsperson requires that there be a strong justification for keeping a name on the list, that is to say, that there must be sufficient information to form a 'reasonable and credible' basis for listing. In view of the important role played by the Ombudsperson in the decisions taken by the Sanctions Committee, I consider that the procedure before it can no longer be regarded as purely diplomatic and intergovernmental. It should also be noted that the periodic review of the list makes it possible, among other things, to ensure that information is regularly updated and that the statement of reasons is supplemented, where necessary. The improvements to the procedure before the Sanctions Committee thus help to guarantee that listings are based on sufficiently serious evidence and are evaluated on an on-going basis.

83. As the Ombudsperson has acknowledged, the judgment of the Court of Justice in Kadi led to the establishment of the Office of the Ombudsperson, which has made it possible to raise the quality of the list considerably. It would be paradoxical if the Court failed to take account of the improvements to which it has directly contributed, even though the Office of the Ombudsperson is not a judicial body.

84. The Ombudsperson has contributed to developing the transmission of information by States to the Sanctions Committee, which ensures that decisions are taken on the stronger foundations. It is only

because of this dialogue that the list will be kept up-to-date and will continue to receive international support. This dynamic might be checked if the Sanctions Committee were forced, de facto, as implied by the solution outlined by the General Court in the judgment under appeal, to communicate to the EU institutions the evidence or information which States have agreed, not without difficulty, to transmit to it. Those States could be less inclined in future to transmit confidential information to the Sanctions Committee, which would have a detrimental effect on the quality and fairness of the listing and delisting procedures. Excessively high regional or national requirements could, in truth, prove to be counterproductive in balancing the fight against terrorism and the protection of the fundamental rights of listed persons.

85. I consider that an effective global fight against terrorism requires confidence and collaboration between the participating international, regional and national institutions, rather than mistrust. The mutual confidence which must exist between the European Union and the United Nations is justified by the fact that the values concerning respect for fundamental rights are shared by those two organisations.

86. This does not mean that carte blanche should be given to the decisions of the Sanctions Committee or that they should be applied automatically without any critical analysis, even where a manifest error is highlighted during the implementation process. However, in my view, since the listing and delisting procedures in the Sanctions Committee allow for a careful examination of whether listings are justified and whether or not it is necessary to maintain them, the EU courts should not adopt a standard of review which would require the EU institutions to examine systematically and intensively the merits of the decisions taken by the Sanctions Committee, on the basis of evidence or information available to that body, before giving effect to them. The improvements to the listing and delisting procedure should strengthen the confidence that the EU institutions and judicature have in the decisions taken by the Sanctions Committee.

87. In the light of the foregoing, I take the view that the listing and delisting procedures within the Sanctions Committee provide sufficient guarantees for the EU institutions to be able to presume that the decisions taken by that body are justified. The improvements to the procedure within the United Nations allow, in particular, the presumption to be made that the reasons cited in support of listing are based on sufficient evidence and information. The EU judicature should not therefore perform an intensive review of the justification for listing on the basis of the evidence and information on which the assessments made by the Sanctions Committee are based.

88. This presumption of justification can, however, be called into question during the implementation procedure within the Union, in the course of which the listed person may adduce new evidence or information. It is clear, in this regard, that the more the procedure within the United Nations is transparent and based on information which is sufficient in terms of its quantity and reliability, the less regional and national implementing institutions will be tempted to challenge the assessments made by the Sanctions Committee.

89. The carrying out by the EU institutions of an implementation procedure that fully respects the rights of the defence allows them, despite the presumption of justification attached to the evaluation made by

the Sanctions Committee, to ensure that a listing within the Union cannot be based on a statement of reasons which is shown to be manifestly inadequate or erroneous. That is why the implementation procedure must allow listed persons and entities to challenge the statement of reasons by adducing new evidence or information, where appropriate.

90. It is therefore essential that the EU judicature carries out a strict review of the way in which the implementation procedure was conducted by the Commission. The review of the internal lawfulness of the contested EU act should be limited to checking for manifest errors of assessment. I shall now consider in greater detail what should be, in my view, the extent and the intensity of the review performed by the EU judicature of EU acts giving effect to decisions of the Sanctions Committee.

B – My proposal for the applicable standard of review

91. To define the extent and the intensity of that review is to ask three questions: what are the benchmarks with reference to which the review is conducted? What is the court reviewing? How does it review?

92. The answer to the first two questions is clear from the judgment of the Court of Justice in Kadi. The EU judicature may be led to review the lawfulness of EU acts giving effect to decisions of the Sanctions Committee having regard to EU law as a whole and, in particular, having regard to the fundamental rights protected within the EU legal order. In addition, the judicial review may relate not only to the external lawfulness of the contested act, but also to its internal lawfulness. The extent of the judicial review is therefore particularly broad, such that it may be described as ‘full’.

93. The answer to the third question raises the issue of the intensity of the judicial review.

94. As is clear from my earlier comments, I do not share the view taken by the General Court to the effect that, in essence, a judicial review of lesser intensity should be treated as equivalent to no review. The EU judicature has always modified its review in the light of the type of dispute before it, the context of the contested act and the nature of the underlying assessments, if, for example, they are complex or if they are of a political nature.

95. In my view, the specific context of the contested regulation, as described above, justifies the aspects relating to the external lawfulness of the regulation being subject to a normal review, whilst the aspects relating to the internal lawfulness of that regulation should be the subject of a limited review.

1. A normal review of the external lawfulness of the contested regulation

96. With regard to the judgment of the Court of Justice in Kadi, one author has noted that reliance on procedural rights often permits indirect protection to be afforded to substantive rights. Others have observed that if the reasons are not communicated, as in Kadi I, there is a presumption of inadequacy or excessiveness capable of justifying the annulment of the act. These two comments rightly highlight the importance of the judicial review of the formal and procedural aspects of the contested act.

97. Performing a strict review of compliance with essential procedural requirements and of the existence of a procedure which respects the rights of the defence allows the EU judicature to adopt a more



restrained stance where it is called upon to review the internal lawfulness of the contested act. This represents the traditional dialectical relationship between the review of external lawfulness and the review of internal lawfulness. In return for the recognition of discretion on the part of the competent political authorities and the resulting restriction of the review of substantive lawfulness, the EU judicature has reinforced the formal and procedural constraints to which it makes the adoption of the act subject. The procedural and formal rules seek to guarantee the substantive lawfulness of the act by that quality to be assessed and, moreover, to facilitate the determination by its author of its appropriateness. By increasing procedural and formal constraints, the judicature thus attempts to reinforce the presumption of the internal lawfulness and appropriateness of the contested measure. As a result, even if the judicature adopts a position of self-restraint as regards the justification for listing, the stringent procedural requirements it lays down guarantee a proper balance between the protection of fundamental rights and the fight against terrorism.

98. As regards the contested act, the EU judicature must rigorously review whether it was adopted in a procedure which respected the rights of the defence. In particular, it must ascertain whether the reasons for listing were communicated to the person concerned, whether those reasons are sufficient to permit him to defend himself properly, whether he was able to submit his comments to the Commission and whether the latter took them adequately into consideration.

99. In determining whether or not the reasons communicated to the listed person were adequate, reference should be made to the Court's settled case-law concerning the obligation to state reasons for EU acts. In essence, the statement of reasons must enable the person concerned to ascertain the reasons for the measures and enable the court having jurisdiction to exercise its power of review. The statement of reasons must indicate the actual and specific reasons why the competent authority considered that a restrictive measure should be adopted in respect of the person concerned, in such a way that the statement allows the person concerned to understand the allegations made against him and to defend himself effectively by challenging the reasons relied on.

100. The requirement of a statement of reasons varies according to the nature of the act in question and the context in which it was adopted. That requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons is adequate must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

101. In other words, the person concerned must be in a position, on the basis of the statement of reasons, to challenge the merits of the contested act. In particular, he must be able to challenge the truth of the claims made, their legal classification and, more broadly, the content of that act, in particular having regard to the principle of proportionality.

102. In addition to verifying that an adequate statement of reasons has been communicated, the EU

judicature must also ascertain whether the person concerned was able to submit his comments to the Commission and whether the Commission took them into consideration adequately. In that regard, the Commission must scrupulously examine those comments and any new information provided by the person concerned.

103. By contrast, in the context of the contested regulation, the requirement of a procedure which respects the rights of the defence does not extend so far as to require the EU institutions to obtain from the Sanctions Committee all the information or evidence which it has available and then to transmit it to the listed person so that he can submit his comments on its relevance.

104. Such communication of evidence is even less justified since, in my view, the EU judicature must limit the intensity of its review of the substantive lawfulness of the contested regulation.

## 2. A limited review of the internal lawfulness of the contested regulation

105. Whilst, as we have seen, the EU judicature must perform a rigorous review of whether the statement of reasons is adequate, it must, by contrast, conduct a limited review of the merits of the statement of reasons. In particular, in view of the fact that it is for the Sanctions Committee to evaluate the appropriateness of a listing, it is not part of its task to examine the evidence in support of the alleged conduct.

106. I consider that the different components of the substantive lawfulness of an EU act giving effect to decisions of the Sanctions Committee must therefore be limited to ascertaining the existence of a manifest error.

107. That is the case, first, with the review of the accuracy of the facts claimed. In the system of interaction established between the Union and the Sanctions Committee, it is for the Sanctions Committee to obtain from the States concerned the information or evidence which makes it possible to establish the existence of facts to justify inclusion on the list. The EU institutions are not intended to have that information or that evidence. Since the substantive accuracy of the facts must be presumed to have been established by the Sanctions Committee, only a manifest error in the factual finding made is capable of leading to the annulment of the implementing act.

108. The same holds, second, for the review of the legal classification of the facts. In my view, the EU judicature must simply ascertain that the Commission did not commit a manifest error when it took the view, in the light of the statement of reasons, that the legal conditions permitting the adoption of a freezing measure were satisfied.

109. Lastly, with regard to the review of the content of the contested act, the review by the EU judicature must be limited, in view of the broad discretion enjoyed by the Sanctions Committee in determining whether inclusion on the list is appropriate, to ascertaining that the listing is not manifestly inappropriate or disproportionate in the light of the importance of the objective pursued, namely the fight against international terrorism.

110. In summary, the review performed by the EU judicature of the internal lawfulness of EU acts giving effect to decisions taken by the Sanctions Committee must not, in principle, call into question the merits

of the listing, except in cases where the implementation procedure for that listing within the European Union has highlighted a flagrant error in the factual finding made, in the legal classification of the facts or in the assessment of the proportionality of the measure.

VI – The protected content of the fundamental rights relied on

111. I shall respond here to the third ground raised by the Commission, by the Council in the alternative, and by the United Kingdom, according to which the General Court committed errors in law in examining the pleas raised by Mr Kadi relating to an infringement of his rights of defence and of his right to effective judicial protection, and a breach of the principle of proportionality.

112. At first instance, the General Court confirmed the argument put forward by Mr Kadi attributing to the rights of the defence and the right to effective judicial protection a content such that the Commission was compelled to obtain and examine the underlying evidence before giving effect to a listing decided by the Sanctions Committee. The Commission thus became a review body for the decisions taken by the Sanctions Committee and the EU judiciary an appellate body for those decisions.

113. I have already explained the reasons why the relationship between the Sanctions Committee and the European Union should not be seen in these terms, but on the basis of mutual confidence and effective collaboration.

114. With this in mind, I take the view that the references made by the Court of Justice in its judgment in Kadi to the need for listed persons to be communicated the ‘evidence adduced against them’ or ‘used against them’ relate only to the communication of a sufficiently detailed statement of reasons, but not to the communication of the evidence or information held by the Sanctions Committee in support of the listings decided by it. I would point out in this regard that the Court was careful to state, in ...Kadi, that ‘overriding considerations to do with safety or the conduct of the international relations of the [Union] and of its Member States may militate against the communication of certain matters to the persons concerned’.

115. In the system of interaction established between the Sanctions Committee and the Union, the protected content of the rights of defence and of the right to effective judicial protection thus resides primarily in communicating to the person concerned a statement of reasons indicating the actual and specific reasons why the competent political authority considered that a freezing measure should be taken and in rigorous consideration of the comments made by the listed person to challenge the relevance of those reasons. In my view, an examination by the Commission and by the EU judiciary of the evidence and information held by the Sanctions Committee, and on the basis of which the Sanctions Committee drafted the statement of reasons, cannot be required on the grounds of the protection of the rights of the defence and of the right to effective judicial protection.

116. In the present case, it must be stated that... Mr Kadi was aware of the actual and specific reasons which, according to the Sanctions Committee, justified his inclusion on the list. The evidence adduced against Mr Kadi does not, contrary to the view taken by the General Court in ... the judgment under appeal, constitute ‘imprecise allegations’ but is sufficiently precise to allow the person concerned to

contest the personal and professional relationships, in connection with Al-Qaeda and its financing, of which he is accused. The same applies, inter alia, to the allegation that the Muwafaq Foundation, of which Mr Kadi was a founding trustee and director, joined with Al-Qaeda, the role played by the Foundation in financing terrorist activities, the links which Mr Kadi maintained with Mr Al-Ayadi, who is alleged to have collaborated with Usama bin Laden, or the allegation that Usama bin Laden provided the working capital for Mr Kadi's companies in Albania.

117. Furthermore, contrary to the assessment made by the General Court ...there is nothing to indicate that the applicant's rights of defence were observed 'only in the most formal and superficial sense'. Mr Kadi has not shown how the Commission failed to carry out a sufficiently careful and close examination of the comments made by him after the communication of the statement of reasons.

118. It follows that the General Court erred in law in taking the view that the contested regulation was adopted in breach of the applicant's rights of defence.

119. In addition, the communication to Mr Kadi of the statement of reasons was such as to permit him to defend himself before the EU judicature and to permit the judicature to conduct a review of the lawfulness of the contested regulation, in accordance with the conditions described above.

120. The General Court therefore committed a further error in law in taking the view ... that, since it could not examine the evidence against the applicant, it was not able to undertake a review of the lawfulness of the contested regulation, which led it to find a breach of the applicant's right to effective judicial protection.

121. Lastly, the General Court committed a final error in law in taking the view that, in the light of its finding of a breach of the rights of defence and the right to effective judicial protection, the applicant's claim that the infringement by the contested regulation of his fundamental right to respect for property entailed a breach of the principle of proportionality was well founded.

122. On all these grounds, I propose that the Court set aside the judgment under appeal....

### **Asset Freezes in the US**

Here is an excerpt from the judgment of the District Court for the District of Columbia in **Kadi v Geithner**

This case, brought by Yassin Abdullah Kadi, a citizen and permanent resident of Saudi Arabia, involves a challenge to the decision of the Office of Foreign Assets Control ("OFAC") to designate him as a "specially designated global terrorist ("SDGT")...The listing of SDGTs is governed by the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq. ("IEEPA"), and Executive Order 13,224 (66 Fed. Reg. 49,079 (Sept. 23, 2001)) ("EO 13,224"). IEEPA "authorizes the President to declare a national emergency when an extraordinary threat to the United States arises that originates in substantial part in a foreign state." *Holy Land Found. v. Ashcroft* ... (D.C. Cir. 2003). Such a declaration provides the

President with extensive authority set forth in 50 U.S.C. § 1702, which permits the President to block property subject to the jurisdiction of the United States. Specifically, the President is authorized to:

investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States . . . .50 U.S.C. § 1702(a)(1)(B).

IEEPA further provides that, in the event of "judicial review of a determination made under this section, if the determination was based on classified information . . . such information may be submitted to the reviewing court ex parte and in camera." ...

After September 11, 2001, the President issued EO 13,224 invoking his authority under IEEPA and the United Nations Participation Act, 22 U.S.C. § 287c. The Executive Order declared a "national emergency" with respect to "grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks . . . committed on September 11, 2001, . . . and the continuing and immediate threat of further attacks on United States nationals or the United States." ... ordered the blocking of property of twenty-seven specific terrorists and terrorist organizations ... The Secretary of the Treasury is authorized to designate additional persons whose property or interests in property should be blocked, where the Secretary finds that such persons "act for or on behalf of" or are "owned or controlled by" designated terrorists, or they "assist in, sponsor, or provide . . . support for" (including "financial . . . support" or "financial . . . services") or are "otherwise associated with" them... The Secretary has delegated his authorities under the Executive Order to the Director of OFAC.... Persons designated pursuant to the Executive Order are referred to as "specially designated global terrorists" (SDGT).... ..Kadi is a citizen and permanent resident of Saudi Arabia and a self-described "prominent Saudi Arabian businessman and philanthropist."... On October 12, 2001, OFAC designated Kadi a SDGT pursuant to the IIEPA and EO 13,224 .. which, by operation of law, resulted in the blocking of all of his property and interests in property subject to the jurisdiction of the United States. It is undisputed that OFAC did not give notice to Kadi before blocking his assets. The designation was made known to Kadi and to the public through a press release instructing financial institutions to freeze Kadi's assets.... A press release was also issued by authorities in the United Kingdom... By letter dated October 15, 2001, OFAC also mailed Kadi a "Notice of Blocking" providing direct notice of the designation and blocking and advising him of the administrative procedures available to challenge OFAC's action... Notice of the designation was also published on October 26, 2001 in the Federal Register...

Kadi thereafter sought judicial review in the High Court in London.... In response to a request for information by the United Kingdom, the United States Treasury Department faxed a two-page document to United Kingdom officials in October 2001 ("two-page fax"), which Kadi learned about during his court proceedings in London... Kadi places much emphasis on this two-page fax, which summarized

unclassified information relating to Kadi's financial support of terrorist activities through a charitable organization known as the Muwafaq Foundation and his other ties to terrorists and terrorism financing. ...Kadi claims that around May 23, 2002, he met with OFAC staff at the U.S. Embassy in Saudi Arabia, where OFAC denied knowledge of the two-page fax... However, there is no dispute that Kadi received a copy of the two-page fax, reviewed it, and proceeded to refute various contentions as part of his petition for reconsideration.

Kadi petitioned OFAC for reconsideration on December 21, 2001. In the months and years thereafter, he has submitted several witness statements and other materials in support of his petition and has engaged in a series of exchanges with OFAC. On March 12, 2004, OFAC issued a twenty-page unclassified memorandum denying Kadi's request for reconsideration ("OFAC Memorandum")... Kadi maintains that this is the only formal written statement he has received from the United States government... Based on these events, Kadi filed this action on January 16, 2009, challenging the evidentiary basis for his designation and the freezing of his assets, and raising an array of constitutional claims. Specifically, he claims violations under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., the IIEPA, and the First, Fourth, and Fifth Amendments. On May 22, 2009, defendants filed a motion to dismiss or, in the alternative, for summary judgment. Kadi opposes the motion and seeks discovery under Rule 56(f). Kadi also seeks leave to file an amended complaint. The Court heard argument with respect to the pending motions on April 9, 2010, and thereafter requested supplemental briefing, which has now been completed...

Plaintiffs challenge Kadi's designation as a SDGT as violating the requirements of the APA, IIEPA, and EO 13,224. The APA requires that the Court "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."... The court must be satisfied that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."... The agency's decisions are entitled to a "presumption of regularity,"... and although "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.".. The Court's review is confined to the administrative record, subject to limited exceptions not applicable here....

## I. APA Claim

### A. Standard for Motion for Summary Judgment and Discovery

Before addressing the merits of Kadi's APA claim, the Court first considers Kadi's preliminary argument that summary judgment is inappropriate because there are disputed issues of material fact. Alternatively, he claims that the motion for summary judgment is premature because he has not been provided an opportunity to obtain discovery on his claims...

In general, summary judgment "is proper only after the plaintiff has been given adequate time for discovery."... However, a party opposing summary judgment and seeking to obtain discovery under Rule

56(f) has the burden of stating "concretely why additional discovery is needed to oppose a motion for summary judgment."..

Kadi argues that because the classified record was not made available to him, he is unable to respond to the motion for summary judgment. Moreover, he claims that because subsequent decisions by other countries "vindicated him," the administrative record is therefore incomplete, and he contends that he should be given an opportunity to supplement it. The Court rejects these arguments. Subsequent to the 2004 decision, Kadi has had several years and opportunities to petition OFAC to supplement the administrative record, but he has not done so. Moreover, absent "evidence that the agency has given a false reason . . . discovery is inappropriate in cases under the APA."... Although Kadi attempts to argue that OFAC has acted in bad faith, nothing in the record supports Kadi's contention. Even if the Court permitted discovery, it is doubtful that it would garner additional facts that would help to decide whether the agency action was arbitrary and capricious, given the deferential review of such actions...

Accordingly, the Court will deny Kadi's motion for discovery under Rule 56(f) with respect to the APA claim and will proceed to resolve it.

#### B. Merits of the APA Claim

Kadi's APA claim primarily challenges OFAC's decision to continue his SDGT designation as arbitrary and capricious, as based on a lack of sufficient procedural safeguards, for insufficiency of the evidence in the administrative record, and for OFAC's misplaced reliance on the facts that were in the record.... In considering the merits of the claim, the Court has reviewed the parties' submissions, the arguments made by the parties at the hearing before the Court, and the entire administrative record, which consists of both the classified and unclassified record.

In reviewing a challenge to the agency's decision as arbitrary and capricious, the Court bears several considerations in mind. The D.C. Circuit has stated that "a highly deferential review applies" to examination of a SDGT designation. ...As previously stated, the "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.".. The agency's decisions are entitled to a "presumption of regularity," ...and although "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.".. The Court, then, "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." .. Courts are particularly mindful that their review is highly deferential when matters of foreign policy and national security are concerned...

#### 1. Overview of the OFAC Decision and Kadi's Arguments<sup>6</sup>

After petitioning OFAC for reconsideration in December 2001, Kadi and the agency engaged in several meetings and Kadi provided numerous statements and submissions. On March 12, 2004, OFAC notified Kadi that his petition for reconsideration was denied and that his name would remain on the list of SDGTs.. OFAC emphasized that its determination rested on the "totality of the record" (both classified and unclassified), which showed that Kadi had financial relationships — primarily through the Muwafaq

Foundation, but also through other Kadi companies — with many persons and organizations that were designated SDGTs by OFAC:

No one element, no one contact, no one accusation of funding is taken as being determinative of the assessment that AL-QADI has been providing support to terrorists through his actions. Rather, when considering the number of sources, the numbers of activities and length of time, the totality of the evidence, both classified and unclassified, this provides a reason to believe Yasin AL-QADI has funded terrorist and extremist individuals and operations.

In deciding that Kadi's continued designation was warranted, OFAC considered an administrative record of over 2800 pages, which included the extensive submissions Kadi made to OFAC during the reconsideration process, as well as other documents. OFAC also considered a classified record. Based on its assessment of all this evidence, OFAC determined that "a reasonable basis remains to continue the designation of [Kadi] under E.O. 13224." OFAC invoked each of the three grounds authorized in EO 13,224, finding that there was "reason to believe" that Kadi was:

- acting for or on behalf of al Qaida, Osama Bin Laden, and Makhtab al-Khidamat, persons listed in the Annex to E.O. 13,224;
- assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, among others, al Qaida, Osama Bin Laden, Makhtab al-Khidamat, Hamas, the Revival of Islamic Heritage Society, Al-Haramayn (Bosnia), Chafiq Ayadi, and Wa'el Julaidan, persons subject to E.O. 13,224; and
- associated with, among others, al Qaida, Osama Bin Laden, Makhtab al-Khidamat, Hamas, the Revival of Islamic Heritage Society, Al-Haramayn (Bosnia), Chafiq Ayadi, and Wa'el Julaidan . . . .

Although OFAC invoked all three grounds, and emphasized its decision to continue the designation based on the totality of the record, OFAC's decision appears to rely primarily on Kadi's financial support of terrorism. Neither Kadi nor the Government take the position that all three criteria must be satisfied in order to uphold the designation.

The OFAC Memorandum contains repeated emphasis on "money" and "funding," both in the "Conclusion" and throughout the final decision. The Government states that it is not moving for summary judgment on the "otherwise associated with" criterion, nor does it seek summary judgment on the "material support" or "services" element of the basis for designation... These terms, however, are the focus of Kadi's vagueness and overbreadth claims.

Kadi acknowledges the highly deferential review accorded to OFAC's decision. But he claims that the administrative record, even when viewed in its totality, shows that "there is no 'substantial evidence' ... of any sort" to support the designation.. and he argues that the evidence underlying OFAC's decision is unreliable. Specifically, Kadi claims that the administrative record fails to support OFAC's findings that he (1) provided support to terrorism through his leadership in the Muwafaq Foundation; (2) provided financial or other support to SDGTs; or (3) had any other ties to justify the sanctions imposed against him... As part of his attack on the sufficiency of the evidence, Kadi takes issue with OFAC's reliance on



his own statements as evidenced in the frequent reference to them in the OFAC Memorandum. He also protests OFAC's use of classified information to support the continued designation. Finally, Kadi continues to dispute the accuracy and reliability of certain pieces of evidence in the record, notably the two-page fax, news articles, and the affidavit submitted by FBI Agent Richard Wright. He also points to subsequent decisions by other countries, with varying procedural postures, as purported indicators of OFAC's error in continuing his designation.

Kadi argues that the two-page fax sent by the United States to the United Kingdom contained "substantially erroneous" information. He further claims that the fax's reliance on "non-evidential sources" such as news articles and information from websites constituted hearsay.... But Kadi's argument that the Government is categorically foreclosed from considering "hearsay" sources is wrong. Courts, including the D.C. Circuit, have held that hearsay evidence can be considered as part of the administrative record. ..Accordingly, OFAC's reliance on newspaper articles, whether in the two-page fax or in the administrative record generally, was entirely proper.

Kadi also alludes to the findings by other investigative bodies around the world that, according to him, have considered the same or similar terrorism allegations against him, and "vindicated" him in every forum... However, the decisions cited by Kadi all post-date the March 2004 OFAC decision under review and are not part of the administrative record. Notwithstanding the impropriety of considering such decisions, the Court would, in any event, be reluctant to rely on the decisions of other countries based on information that likely differed from the administrative record compiled by and available to OFAC. Moreover, these decisions may have been reached under different standards of proof or review, which further undermines any persuasiveness they would have.

## 2. Kadi's Involvement in the Muwafaq Foundation

The Court now turns to the evidentiary basis for OFAC's conclusion that Kadi provided support — particularly financial support — to terrorist causes and to other SDGTs. OFAC emphasizes Kadi's leadership in the Muwafaq Foundation in its March 2004 decision. Accordingly, the Court looks first to Kadi's relationship with that entity.

The Muwafaq Foundation — Arabic for "Blessed Success" or "Holy Success" — was founded in the Channel Islands on May 31, 1992 as a charitable foundation. Sudan was the first country in which Muwafaq was active; it subsequently operated in Pakistan, Afghanistan, Ethiopia, Somalia, Bosnia/Herzegovina, Albania, Austria, and Germany... Kadi refers to Muwafaq as a "highly decentralised operation" that "carried out separate activities in various countries or regions"; therefore, it had "no central administration," and "no central accounting systems nor any central bank accounts".. Muwafaq reportedly terminated operations in 1996 or 1997, but the OFAC Memorandum states that Muwafaq "continued to operate until mid-2001 under the umbrella of Makhtab al-Khidamat . . . considered to be the precursor to al-Qaida," before Makhtab al-Khidamat dissolved and was absorbed into Osama Bin Laden's organization, and that "Muwafaq . . . joined [al-Qaida]."... Kadi's submissions also note that Muwafaq is still registered in Holland and Belgium..

The administrative record reflects that Kadi played a significant leadership role in Muwafaq. Kadi is one of six trustees, and the others "delegated . . . the running and operation of the Foundation" to Kadi, who "was the driving force behind the administration of the foundation.".. He effectively conceded that he directly supervised the individual country offices. Kadi "selected the managers responsible for the various countries"; worked with them to determine "which charitable activities to engage in"; helped "raise money for those activities" ; and, "[w]henever possible," he visited the country locations where Muwafaq operated "to meet with the country managers regarding the activities of the Foundation," "about 3-4 times a year" for each country. ..Significantly, in addition to choosing and managing Muwafaq's personnel, Kadi also transferred funds to the organization. He concedes that he made those transfers, but argues that they were "solely and exclusively for the charitable purposes of the foundation." OFAC relied on Kadi's involvement in Muwafaq and, in particular, activities claimed to have occurred in Bosnia, Albania, Sudan, and Pakistan, to conclude that Kadi financially supported terrorist activities, primarily through Muwafaq, but also through other Kadi-owned entities. It considered Kadi's relationships with, and financial transfers to, designated terrorists Abdul Latif Saleh, Wa'el Julaidan, and Chariq Ayadi — who were all involved in Muwafaq.

a. Activities in Albania and Bosnia and Kadi's Relationship to Saleh

OFAC pointed to Kadi's activities in Albania, through Muwafaq and other Kadi-owned entities, as evidence of Kadi's financial support of terrorist activities and other SDGTs. OFAC also concluded that "[s]ome involvement in the financing of these activities had also been provided by Osama Bin Laden." .. According to OFAC's findings, Muwafaq gave logistical and financial support to Al-Gama'at Al-Islamiya, a mujahadin battalion in Bosnia that was designated as a SDGT on October 31, 2001. The organization also transferred \$500,000 to terrorist organizations in the Balkans in the mid-1990s.... OFAC also found that Muwafaq was involved in arms trafficking from Albania to Bosnia. And OFAC concluded that as of late 2001, Kadi had continued to finance institutions and organizations in the Balkans after Muwafaq ceased operations there, including two entities that were designated as SDGTs in early 2002 —The Revival of Islamic Heritage Society's Pakistan and Afghanistan offices and the Bosnia-Herzegovina branch of the Al-Haramain Foundation..

Kadi also owned several Albanian companies, which, according to OFAC, "funneled money to extremists or employed extremists in positions where they controlled the firms' funds."... In addition, "Bin Laden allegedly provided the working capital for four or five of AL-QADI's companies in Albania." ... In 1992, Kadi met Abdul Latif Saleh at a medical conference, and soon thereafter entered into several business ventures with him, including Karavan, an Albanian construction and property development company, and what OFAC characterizes as Kadi's main Albanian firm.. According to OFAC, Saleh was general manager of all of Kadi's businesses in Albania and held 10% of Kadi Group investments in Albania... He was also an "official signer" for Karavan and its bank accounts, and had authorization to withdraw money directly from Kadi's bank accounts and transfer funds.. Saleh was also the head of Muwafaq's Albanian operations..

Kadi himself admits that money was taken from his local businesses "to make payments to support [Muwafaq's] activities."... Money was often taken from Karavan's accounts to fund Muwafaq, and Karavan's accounts were also used to make contributions to other nongovernmental organizations; Kadi would then reimburse Karavan... This arrangement was confirmed by OFAC's interviews with two Karavan employees — Violet Spaho, a financial manager, and Amr Al Zainy (aka Amr al-Zaini), who was Karavan's director and Kadi's financial representative in Albania. According to OFAC, when Karavan was ready to send a large sum of money back to Saudi Arabia as profits, the main office in Saudi Arabia instructed Karavan to give the funds to charitable causes, which included Muwafaq.... OFAC pointed to large wire transfers in and out of Kadi's personal bank accounts, as well as large cash withdrawals made from Karavan accounts and large payments to Saleh..

In 1999, Saleh was deported from Albania. Kadi claimed that Saleh was deported as a matter of mistaken identity — he shared the same name with an Egyptian citizen who was "a member of the Jihad Group." ... However, OFAC had a different account. It found that Saleh was expelled because of his ties with known terrorists, including Osama Bin Laden, and stated that Saleh's number had been found in the phone books of Bin Laden associates who had targeted the U.S. Embassy in Tirana in 1998. OFAC, based on an interview with Al Zainy, noted that when Wa'el Julaidan, a SDGT characterized by OFAC as a "Bin Laden associate," visited Albania, Saleh treated Julaidan as his boss... OFAC also believed that Saleh had founded and organized the Albanian Islamic Jihad (AIJ).. OFAC claimed that Kadi was an active supporter and fundraiser for AIJ, and noted that Muwafaq operated a school in Kukes in 1997, where several students had been selected for membership in AIJ.. Kadi confirmed that Muwafaq financially supported the school, and that Saleh was involved in running it, but stated that it shut down due to financial problems..

#### b. Involvement in Other Countries and Other Muwafaq Ties

OFAC also considered Muwafaq's involvement in other countries such as Pakistan and Sudan, and other connections that indicated that Muwafaq was tied to terrorist activities and SDGTs. Muwafaq's Pakistan operation was established in Islamabad in 1992, and Kadi hired Amir Mehdi to be its local director.... As director, Mehdi's responsibilities included handling and distributing Muwafaq funds. Mehdi turned out not to be a good choice. Kadi himself conceded that the Pakistan Government raided Muwafaq's office in Islamabad on March 21, 1995, and that subsequently "the officials of the FIA (the Pakistan security services) arrested Amir Mehdi on March 29, 1995." .. Kadi's only explanation was that FIA had also conducted raids and targeted other Muslim charities working in Pakistan.. According to OFAC, however, the reason for the raid was Mehdi's involvement in terrorist activities. Specifically, one of Mehdi's telephone numbers had been used by associates of terrorists in Pakistan and abroad, and open source reporting had indicated that the raid was triggered by Ramzi Yousef's arrest for the first World Trade Center bombing... Kadi claimed that he terminated Mehdi's employment following his release from arrest in 1995... The Pakistan offices were permanently closed in 1997...

OFAC also pointed to ties between Muwafaq's office in Sudan and Osama Bin Laden, as well as Kadi's claimed acknowledgment that Muwafaq's Sudan office had "provided assistance to jihad activities in the Middle-East and the Balkans." .. The administrative record reflects that Sudan was the first country in which Muwafaq was active, and that it had an office in Khartoum... OFAC stated that when Muwafaq opened in Sudan, around 1991 to 1993, Osama Bin Laden was based in the country. Kadi closed the office in 1996, apparently having become embroiled in accusations of terrorism... The Africa Confidential had implicated Muwafaq in terrorism, but Kadi and the publication eventually settled a libel action. OFAC considered that resolution, but rejected Kadi's claim that it supported a finding that Muwafaq was not involved in supporting terrorist activities or SDGTs..

OFAC also considered Muwafaq's relationship to Makhtab al-Khidamat, an umbrella organization established in the early 1980s that was believed to be the precursor to al-Qaida. OFAC found that "Muwafaq was part of Makhtab al-Khidamat and continued to operate under the Makhtab al-Khidamat umbrella until mid-2001, when the latter dissolved and was absorbed into Osama Bin Laden's organization. Subsequently, a number of Arab [NGOs] and organizations formerly affiliated with Makhtab al-Khidamat . . . joined Al-Qaida. These included Muwafaq." .. Kadi denies this claim, noting that Muwafaq had ceased operating by 1998 at the latest....

#### c. Kadi's Arguments

Kadi disputes OFAC's findings and maintains that Muwafaq was an organization engaged in charitable activities, not in supporting terrorism. He claims that he provided a legitimate explanation for any expenditures through Muwafaq, which OFAC simply ignored, and accuses OFAC of drawing a conclusory connection between Muwafaq (and by extension, Kadi) and terrorism, by failing to consider "all of the good works done by the Foundation.".. Although Kadi admits that he transferred large amounts of cash to certain Muwafaq personnel who were implicated in terrorist activities, Kadi claims no knowledge of their involvement and states that, in any case, his involvement with them predated their designations as SDGTs.

Kadi surmises that the "principal source" for accusations against Muwafaq was likely the October 19, 1999 USA Today article authored by Jack Kelley... The article, titled "Saudi Money Aiding Bin Laden Businessmen Are Financing Front Groups," described how prominent businessmen in Saudi Arabia were transferring tens of millions of dollars to Bin Laden-linked bank accounts, and identified "Blessed Relief" as a "front" for Bin Laden... Kadi contends that this article was unreliable because USA Today later conceded that it had "several errors" and because Kelley was subsequently found "to have fabricated several high-profile stories." ...

To the extent Kadi contends that newspaper articles cannot be relied upon by the Government at all, that proposition is not well-grounded. As already stated, reliance on hearsay is plainly allowed. Furthermore, reliance on newspaper articles has been permitted to "fill in evidentiary gaps when there is corroboration," as well as to provide background information... This is consistent with the generally recognized principle that reliability of evidence and reasonableness are the touchstones of measuring the

agency's decision, in contrast to Kadi's assumption that newspapers are per se unreliable.

More to the point, Kadi does not claim that Kelley fabricated any assertions in the article that would be relevant here. And, although USA Today ultimately corrected some errors that appeared in the article, the published correction post-dated OFAC's decision and hence is not part of the administrative record. The same reasoning applies to Kadi's reliance on Kelley's subsequent resignation. Moreover, OFAC does not appear to rely significantly on Kelley's article. And Kadi, as part of his submissions, provided OFAC with his version of the claims made in the Kelley article.. OFAC therefore had the benefit of Kadi's account which it then reasonably discredited based on the evidence in the record as a whole.

Contrary to Kadi's argument that OFAC "failed to consider" the good works of Muwafaq, both the March 2004 OFAC Memorandum and the administrative record indicate otherwise. OFAC acknowledged that Kadi had provided evidence of Muwafaq's involvement "in substantial charitable activities."

Nevertheless, OFAC concluded that this evidence "by no means undermines the determination that the charity was, in addition, used to fund terrorism." .. It was not unreasonable for OFAC to conclude that charitable organizations that perform good works could also concurrently act as conduits for terrorist activities. In its Memorandum, OFAC cited to the April 12, 2002 testimony by the Deputy Assistant Secretary for Terrorism and Violent Crime before the House Financial Subcommittee on Oversight and Investigations:

Investigation and analysis by enforcement agencies have yielded information indicating that terrorist organizations sometimes utilize charities to facilitate funding and to funnel money. Charitable donations to non-governmental organizations (NGOs) are commingled and then often diverted or siphoned to groups or organizations that support terrorism . . . . Though these charities may be offering humanitarian services here or abroad, funds raised by these various charities are sometimes diverted to terrorist causes. This scheme is particularly troubling because of the perverse use of funds donated in good will to fuel terrorist acts.

Simply because Muwafaq was a charitable organization or performed charitable deeds does not make it immune to designation by OFAC. Indeed, other courts have upheld OFAC's designations of charitable organizations, notwithstanding their status or involvement in good deeds....

As for Kadi's argument that he did not intend to provide financial support to SDGTs or for terrorist acts through Muwafaq or his other companies, that claim is unavailing. Kadi's intent in donating to terrorist causes or to SDGTs is not relevant here... Moreover, the Court rejects Kadi's contention that OFAC should have disregarded any pre-designation information about individuals or organizations....

The Court has reviewed the evidence both in the classified and unclassified records. The record, taken as a whole, and with references to various sources over different periods of time, confirms Kadi's close involvement in Muwafaq and, in turn, Muwafaq's involvement in the financing of terrorist activities and support of SDGTs, despite whatever charitable works the foundation may also have undertaken.

Evidence in the unclassified record indicates that Kadi was integrally involved in running Muwafaq, including the hiring and placement of SDGTs in key roles in the foundation, who then had the authority

and ability to receive money from Kadi, to access Kadi's funds, and to designate and divert those funds to other sources and causes. Kadi himself admitted to transferring funds to such Muwafaq personnel, or allowing them access to his personal funds. Although he claimed in every instance that either the funds were accessed for charitable purposes or that he had no knowledge to what ends the funds may have actually been used, OFAC reasonably concluded that Kadi's claims were incredible considering all the other evidence in the record. And although the Court cannot cite to any specific information in the classified record, the Court's careful review confirms that there is substantial evidence in the record before OFAC that Kadi was involved, through Muwafaq, in providing financial support for terrorists.

### 3. Financial Support to other SDGTs

Substantial evidence in the record also supports OFAC's conclusion that Kadi provided financial support to other SDGTs, including Muhammad Salah, Chafiq Ayadi, and Wa'el Julaidan. In each instance, Kadi claims that his association with these individuals pre-dated their designations and that the transfers of money he provided to them were all for legitimate purposes. He claims that these relationships were benign, that he "worked with individuals who he knew, trusted, and respected, based on their track records in the relevant charitable or humanitarian field,"... and that OFAC had no basis to conclude that any of these individuals "were connected with terrorism in any way" because they were designated years after Kadi had known them.. Some of these contentions have already been addressed by the Court, but they are unavailing in all respects and unsupported by the evidence in the record..

#### a. Wa'el Julaidan

Julaidan was designated a SDGT on September 6, 2002. Kadi stated that he has known Julaidan as a family friend, and that their relationship predated Julaidan's SDGT designation by twenty years.. According to Kadi, Julaidan came from a reputable family and had a reputation for trustworthiness.. Julaidan was the head of the Saudi Joint Relief Committee in Kosovo and had assisted Kadi in creating a women's teachers' college for Croatian and Bosnian refugees.. While Kadi admits to a longstanding personal and business relationship with Julaidan, he contends that there is no basis for the allegations that Julaidan was an associate of Osama Bin Laden or that Kadi himself was aware of this fact..

Kadi admitted that he provided significant financial benefits to Julaidan. For example, he stated that he gave shares of a business he owned, "KA Stan," to Julaidan as a "reward for the assistance he provided to [Kadi's] charitable activities in Bosnia." .. The only shareholders in KA Stan were Kadi, Julaidan, and Chariq Ayadi, another SDGT. See *id.* Kadi also acknowledged that he transferred \$1.25 million through Karavan directly to Julaidan's personal account between February 24, 1998 and August 3, 1998.. Kadi stated that the money was intended to fund the creation of housing units for Al Emam University in Sanaa, Yemen, a project that was being overseen by Julaidan's company Maram.. Kadi also admitted that he transferred the funds at issue to Julaidan's personal account,.. but claimed it was "solely and exclusively for the purpose of supporting the University Housing Project, and not for any other purpose," ... He explained that he did not transfer the funds to Maram, because he "had entrusted the University

Housing Project to . . . [Julaidan] alone." .. This explanation is puzzling, particularly because Maram was Julaidan's own company, and Kadi had relied on a table of information purporting to show that Julaidan made payments of substantially the same amounts to his company soon thereafter.

Kadi's table was submitted to OFAC to demonstrate that the funds had a legitimate purpose, corroborated by timing. The table shows that after each of the five payments to Julaidan, Julaidan then made a payment to Maram of substantially the same amount, to correspond with construction invoices for the same figures.. However, there are several problems with Kadi's version of events, and with the information he provided to OFAC. For instance, \$100,000 appears to be unaccounted for in the table.. Although Julaidan received a total of \$1.25 million from Kadi, the table reflects that only \$1.15 million was transferred to Maram.... Footnote 2 to Kadi's table also states that "[a]ccording to bank statements of Maram's account . . . [one] sum [\$300,000] was never received in Maram's account . . . ." Kadi presumably believes this is not a problem because his table still shows "invoices" and "demands" to Maram totaling \$1.249 million. But the mere existence of invoices (and "demands") does not necessarily show that Kadi's transfers to Julaidan were used to pay those specific invoices, particularly because "money is fungible."

OFAC also reasonably discredited Kadi's claim that he did not know of Julaidan's relationship to Osama Bin Laden. Kadi himself conceded that it was "common knowledge" that both Julaidan and Bin Laden had known each other through their involvement in repelling the Russian invasion of Afghanistan in the 1980s. ..Kadi explained, though, that he had no knowledge whether this association continued. However, Kadi also stated that he asked Julaidan on "several occasions" whether he had an ongoing relationship with Bin Laden, which Julaidan had denied.. It is somewhat disingenuous, then, for Kadi to claim that he had no knowledge or suspicion at all that Julaidan may have continued working with Bin Laden.

Kadi also acknowledged that the Saudi Arabian government had frozen Julaidan's assets in 2002 based on its finding that Julaidan had supported Osama Bin Laden's terrorism network. The administrative record contained a press release from the Saudi Embassy in DC issued on September 10, 2002 that referred to Julaidan as a "Bin Laden operative" and stated: "Julaidan, a Saudi fugitive is believed to have funneled money to al-Qaeda. . . . Osama Bin Laden and a top al-Qaeda lieutenant, Abu Zubaida, have acknowledged Julaidan as a known associate for their operations. Julaidan, who fought with Bin Laden in Afghanistan during the 1980s, allegedly provided financial and logistical support to the al-Qaeda network."... Kadi's only response to this evidence was that the incident occurred years after the transaction at issue. That argument is not compelling... Kadi also does not rebut OFAC's observation that Osama Bin Laden referred to a close relationship with Julaidan in a 1999 interview on Al-Jazeera TV, where Bin Laden reportedly said: "We are all in one boat, as is known to you, including our brother Wa'el Julaidan," when referring to the assassination of al-Qaida "co-founder" Abdullah Azzam..

Ultimately, OFAC concluded that Kadi's explanation for why he transferred \$1.25 million to Julaidan, and conveyed other financial benefits to Julaidan, should not be credited, and that his continued designation was warranted on the basis of his support of and relationship with SDGT Julaidan. OFAC also rejected Kadi's excuse that he knew Julaidan before he was designated, and his plea that transactions

or activities he engaged in with Julaidan prior to Julaidan's designation should be disregarded... OFAC's conclusions were substantially supported by the record, both classified and unclassified, and are consistent with the caselaw in this Circuit.

b. Chariq Ayadi

Ayadi was designated a SDGT on October 12, 2001 — the same day as Kadi. He was hired by Kadi to run Muwafaq's European operations, based on Julaidan's recommendation. Ayadi oversaw Muwafaq's European operations from 1992 to around 1995 or 1996. Kadi acknowledged transferring significant sums to Ayadi's personal bank account during that time. As with Julaidan, Kadi maintained that these transfers were solely for charitable purposes... Kadi also entrusted Ayadi with other aspects of his business. In early 1996, Kadi purchased a majority holding in the now-closed Sarajevo-based Depositna Bank. Kadi designated Ayadi the "nominee" for the shares.. He explained that he chose Ayadi as his representative because Ayadi was of Bosnian nationality, and under local law, shareholders of a bank must be of Bosnian nationality.. OFAC regarded Depositna Bank as suspect for other reasons. It "has been associated with Islamic extremists," including serving as the site for planning sessions for an attack against a U.S. facility in Saudi Arabia in the mid-1990s. .. As previously stated, Ayadi was also one of three shareholders, along with Julaidan and Kadi, in KA Stan... OFAC also cited to Ayadi's expulsion from Tunisia for his involvement in the Tunisian Islamic Front.

As with Julaidan, Kadi admitted to transferring the funds to Ayadi's personal accounts, but claimed they were intended for legitimate charitable purposes. He also claimed that he knew Ayadi nine years prior to his designation and had never heard of the Tunisian Islamic Front or any allegations linking Ayadi to the organization until he was designated a SDGT in October 2001. In short, Kadi maintained that he had no knowledge of Ayadi's involvement with the Tunisian Islamic Front or terrorist activities...

c. Muhammad Salah

Kadi also admitted to transferring funds to Muhammad Salah, who was designated a SDT on July 27, 1995 pursuant to Executive Order 12,947, and a SDGT on October 31, 2001 pursuant to EO 13,224. . Salah is a self-declared Hamas operative. Yet again, as with Julaidan and Ayadi, Kadi claimed that the transfer of funds he made to Muhammad Salah was for legitimate and charitable reasons.. OFAC's March 2004 Memorandum and its motion to dismiss focus a great deal on an \$820,000 land deal involving Salah.. The details of the land deal are complicated and muddled, but the most salient facts that OFAC considered can be summarized briefly. In July 1991, Kadi, via his company Qadi International, wired \$820,000 from the Swiss branch of Faisal Finance to the Quranic Literacy Institute (QLI) in Chicago. The money was used to purchase and develop land in Woodridge, Illinois. Salah, a QLI "employee"/volunteer, was involved in the flow of money that followed the land deal. He was arrested by the Israeli government on January 25, 1993, around the time Kadi was wiring money to him, and pled guilty to illegally channeling funds for Hamas in Israeli military court in January 1995.



Kadi did not dispute that the deal occurred, nor did he dispute that he was transferring money to Salah. ..Kadi admitted that although he only met Salah on two or three occasions "at the most,".. in less than a one-year period he transferred \$167,000 directly to Salah's personal account.. He maintained that the money was intended for various QLI expenses "and mainly to support individuals working for QLI.".. He claimed that he sent the money to Salah personally at the request of another individual, Dr. Zaki, with whom he had longstanding ties... Kadi presented extensive documentation (and briefing) in support of his interpretation of the deal as legitimate. He claimed he had no idea that Salah was involved in Hamas. The breakdown of money transferred by Kadi directly to Salah was as follows: (1) \$27,000 on March 16, 1992; (2) \$30,000 on July 3, 1992; (3) \$50,000 on October 7, 1992; and (4) \$60,000 around February 1993.. Upon learning that Salah was arrested in January 1993, Kadi instructed his bank to stop the last transfer but, according to Kadi, the transfer proceeded regardless. AR 303. Kadi claimed that he ceased making transfers to Salah after he was arrested, but admitted that he continued to transfer funds to QLI. . In 1994, QLI sold the Woodridge land, but did not repay the \$820,000 "loan" to Kadi. In 1999, the Government brought a civil forfeiture action against QLI, Muhammad Salah, and his wife in federal court in the Northern District of Illinois, which included allegations against Kadi. The proceeds of the land deal were tied up in that litigation. On a motion to dismiss, the district judge concluded, based in part on the 1998 affidavit of FBI Special Agent Robert Wright, that "the circumstances surrounding the Woodridge land deal, the relationship between QLI and Salah, and the efforts of QLI to provide financial support to Salah all raise the inference that QLI ordered Kadi to transmit the money used to purchase the Woodridge land with the intent that it would be used to support Salah in his activities on behalf of Hamas."..

Kadi spent much time refuting the assertions made in the Wright affidavit submitted in the forfeiture action, and maintained that he never intended to obfuscate the details of the land purchase or his involvement in it.. He claimed that in April 2005 Wright "was under investigation for disciplinary conduct, was suspended and his employment was subsequently terminated by the FBI.". However, Kadi did not contend that Wright's problems were probative of the reliability of his statements contained within the administrative record. Moreover, those problems occurred in April 2005, subsequent to OFAC's March 2004 decision challenged by Kadi here, and are therefore not part of the administrative record. ..Once again, Kadi claims that all the transfers he made were to support legitimate charitable objectives, not terrorism. Here too, based on the evidence in the classified and unclassified records, including the findings in the forfeiture action and the Wright affidavit, OFAC reasonably rejected Kadi's explanation for why he was transferring funds to SDGT Salah's personal accounts, and the overall structuring of the deal, as well as Kadi's contention that he had no knowledge of Salah's affiliation with Hamas or other terrorist activities.

#### 4. Financial Support and Ties to Bin Laden

Kadi disputed having ties to Osama Bin Laden, and contended that he neither managed money nor businesses for Osama Bin Laden directly, or for his benefit.. Kadi also asserted that Bin Laden, in turn,

had no financial interest in any of Kadi's businesses.. Kadi claimed that he met Bin Laden on a few occasions ending in 1993, but that those encounters did not involve or concern terrorism.. However, OFAC reasonably relied on other evidence in the record, which indicated that Kadi's ties with Osama Bin Laden may have continued, including reference to a letter found in 2002 that was addressed to Bin Laden and referred to Kadi as "managing money for Bin Lad[e]n in Sudan.". OFAC noted that Kadi opened up a Muwafaq office in Sudan around the same time Bin Laden was based in the country.. The letter, according to OFAC, also appeared to generally refer to Kadi as one of Bin Laden's "former managers."

#### 5. Other Acts of Financial Support and Investment

OFAC pointed to other acts of financial support and investments by Kadi with individuals who have ties to terrorist activities, although OFAC did not appear to rely on these ties directly in applying the criteria of EO 13,224 to Kadi. The OFAC Memorandum described Kadi's involvement in BMI, Inc. as further support for Kadi's ties to terrorists. OFAC claimed that one of Kadi's co-investors in BMI was a SDT named Mousa Abu Marzook, a Hamas leader also associated with Muhammed Salah. Kadi maintained that his investment in BMI was "passive" and "entirely innocent." He claimed that he was not aware of a relationship between BMI and Marzook.. OFAC also concluded that Kadi made use of entities other than Muwafaq to send money to extremists and identified SDGT Asbat al-Ansar as one such recipient. According to OFAC, acting through "an unspecified Albania-based Islamic group," Kadi "promised fund transfers to an official of the al-Qa'ida supported terrorist group Asbat al-Ansar," which was designated on September 23, 2001.. Kadi contended that he did not know of the organization Asbat al-Ansar.

The Court has carefully reviewed both the classified and unclassified records and finds that the administrative record as a whole amply supports OFAC's findings and its determination to continue Kadi's designation. OFAC reasonably concluded that Kadi provided financial support — primarily through the Muwafaq Foundation, but also through other means — to many persons who were designated SDGTs. It also had good reason to reject Kadi's explanations that his numerous financial transfers to these SDGTs were legitimate, or that they were, in every instance, made without Kadi's knowledge of their affiliations with terrorist groups and activities. OFAC reasonably concluded that these claims were simply too incredible, in light of the totality of the evidence before it.

Ultimately, Kadi's arguments attacking the sufficiency of the evidence before OFAC are without merit. OFAC relied on more information than Kadi's own voluminous statements and submissions, although it is evident that OFAC seriously considered his explanations, asked follow-up questions, and requested additional information in order to address continuing areas of concern. And Kadi's claim that the two-page fax, and the articles cited and the sources represented therein, contained deficiencies, is besides the point. While providing Kadi a window into OFAC's reasoning, these items do not represent the whole picture — the information relied on by OFAC that Kadi attacks as unsubstantiated is further supported by the classified record, which confirms Kadi's financial transactions and relationships with SDGTs.

The Court fully acknowledges and is sympathetic to Kadi's argument that he is at somewhat of a disadvantage in being unable to review the whole administrative record, in particular the classified record... And admittedly, OFAC's unclassified Memorandum draws heavily from Kadi's own statements and submissions, as well as "information available to the U.S. Government," without elaborating in that public record as to what the source of this information might be. Hence, the March 2004 OFAC Memorandum, standing alone, may be somewhat unsatisfying to Kadi. However, "[a]n agency's decision need not be 'a model of analytic precision to survive a challenge,' and '[a] reviewing court will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'... And, as previously stated, it was wholly proper for OFAC to rely on classified material in making its determination. See, e.g., IEEPA, 50 U.S.C. § 1702(c) ("[I]f the determination was based on classified information . . . such information may be submitted to the reviewing court ex parte and in camera"); Holy Land Found. ... ("due process require[s] the disclosure of only the unclassified portions of the administrative record") (quoting People's Mojahedin Org. of Iran, 327 F.3d at 1242 (emphasis in original)); Nat'l Council of Resistance of Iran, 251 F.3d at 208-09 (holding that the "opportunity to be heard at a meaningful time and in a meaningful manner" does not include access to the classified record)...And as also previously addressed, there are compelling reasons why portions of the record must remain classified. The Court has carefully reviewed both the classified and unclassified records, and finds that there is substantial evidence to support OFAC's conclusion that Kadi's continued designation as a SDGT was warranted. Accordingly, the Court finds that OFAC "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action . . . including a rational connection between the facts found and the choice made."...

## II. Constitutional Claims

...Given the Court's determination that substantial evidence supports OFAC's conclusion that Kadi should remain designated as a SDGT, the merits of Kadi's constitutional claims stand on weak footing. Indeed, as previously expressed, some of these constitutional claims — including Kadi's argument that OFAC exceeded its statutory authority — parallel the arguments raised by Kadi relating to his APA claim...

### A. Ability to Raise Constitutional Claims

To begin with, the Government argues that all of Kadi's constitutional claims must be dismissed because Kadi is a non-resident alien with no substantial connections to this country and hence he lacks the ability to assert any rights under the United States Constitution.. In arguing to the contrary, Kadi claims that because the blocking and freezing of his assets in the United States occurred as a result of action initiated by the United States itself, he should be entitled to raise constitutional claims in response to those actions.. Alternatively, without conceding the accuracy of OFAC's claims as to his contacts with the United States, Kadi argues that he satisfies the standards to raise due process claims.

There is no clear path to resolving these arguments. The D.C. Circuit has not explicitly addressed what criteria this Court should apply in considering whether a foreign national residing outside the United

States can satisfy the "substantial connection" test to raise rights under the U.S. Constitution related to the blocking or freezing of his assets. Nor has the D.C. Circuit addressed whether such rights turn on the presence of property in the United States, or whether Kadi can raise certain constitutional claims, but not others.... Some cases in this jurisdiction provide guidance, but no case provides definitive answers. In several cases, the D.C. Circuit has addressed whether foreign nationals have rights under the U.S. Constitution in the context of cases involving the designation of Foreign Terrorist Organizations ("FTOs")... These cases have looked to the presence of property as the benchmark for satisfying the "substantial connections" test, and whether a party has the ability to raise constitutional claims, at least with respect to that property.

In National Council of Resistance of Iran, the D.C. Circuit held that two Iranian organizations designated as FTOs were entitled to due process protections under the Fifth Amendment because they had "developed substantial connections with this country.".. The court pointed to the designated organizations' "overt presence within the National Press Building" and "claim[ ] [of] an interest in a small bank account.".. In People's Mojahedin of Iran, the D.C. Circuit held that "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise,".., and that plaintiffs there lacked substantial connection to the United States. The court stated: "We put to one side situations in which an organization's bank deposits were seized as a result of the Secretary's designation. Neither . . . [petitioner] suffered that fate, presumably because no United States financial institutions held any of their property." Hence, the court found that People's Mojahedin of Iran could not raise constitutional claims because it had no property in the United States, nor any other substantial connections. *Id.* Ultimately, events had evolved such that two organizations — National Council of Resistance of Iran and People's Mojahedin of Iran — were found to be alter egos. Hence, the D.C. Circuit concluded that People's Mojahedin of Iran, via National Council of Resistance of Iran's connections, had sufficient connections to bring a constitutional claim. In analyzing "substantial connections" to the United States, the court remained focused on property rather than physical presence, stating:

[T]here is before us at least a colorable allegation that at least one of the petitioners has an interest in a bank account in the United States. . . . We have no idea of the truth of the allegation . . . but for the present purposes, the colorable allegation would seem enough to support their due process claims. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92, 51 S. Ct. 229, 75 L. Ed. 473, 71 Ct. Cl. 785 (1931), makes clear that a foreign organization that acquires or holds property in this country may invoke the protections of the Constitution when that property is placed in jeopardy by government intervention. *Nat'l Council of Resistance of Iran*, 251 F.3d at 204.

In *32 County*, which also involved a challenge to an organization's FTO designation, the D.C. Circuit concluded that "[t]he Secretary therefore did not have to provide *32 County* . . . with any process before designating them as [FTOs]" because it was not shown "that either organization possessed any controlling interest in property located within the United States, nor do they demonstrate any other form

of presence here." Taken together, then, these cases at least imply that a foreign national with property in the United States has a sufficient connection to the United States to raise at least some constitutional claims.

Further obfuscating matters, however, and subsequent to the briefing in this case, the Southern District of New York dismissed claims against Kadi for lack of personal jurisdiction in litigation relating to the September 11 terrorist attacks... In that case, plaintiffs attempted to secure personal jurisdiction over Kadi by arguing that he had sufficient contacts with the United States. They claimed that Kadi had incorporated a branch of Muwafaq in Delaware in 1992, which remained operational until 1997, and that he made financial transfers to individuals in the United States who then transferred the money for use for terrorist purposes.. They also claimed that he was involved in real estate investments in Massachusetts and Pennsylvania. See *id.* Considering these allegations, the court concluded that Kadi lacked sufficient contacts with the United States for personal jurisdiction. Neither party has asserted that this Court should rely on the analysis applied by *In re Terrorist Attacks on September 11, 2001* to resolve whether Kadi has substantial connections sufficient to raise his constitutional claims here. And that case, in light of the caselaw in this Circuit, does not necessarily bar Kadi from raising at least some of his constitutional challenges to the designation and continued blocking of his assets, provided that Kadi has some property here.

Another case, *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008), also indicates that the ruling in *In re Terrorist Attacks on September 11, 2001* does not dispositively address Kadi's ability to raise constitutional claims. Al-Aqeel, like Kadi, was a citizen and resident of Saudi Arabia, who sought to challenge his SDGT designation. And like Kadi, Al-Aqeel had also been named in September 11-related litigation in the Southern District of New York. The Government argued that Al-Aqeel lacked insufficient connections to the United States to raise any constitutional claims, and pointed to Al-Aqeel's arguments regarding lack of personal jurisdiction in an earlier case then pending in the Southern District of New York... Rejecting those arguments, the court observed that the issue in *Burnett* was whether Al-Aqeel, as a defendant, had purposefully availed himself of the protections of the law of the forum — the State of New York — for the court there to exercise personal jurisdiction over him.... The court reasoned that the question before it was whether Al-Aqeel, as a plaintiff, had sufficient connections with the United States as a whole to have standing to raise claims under the United States Constitution.. Ultimately, the court concluded that Al-Aqeel had established sufficient contacts in the United States, through his frequent visits to the United States, his position as an officer of a United States corporation, and his involvement in helping the organization acquire property in the United States, to raise "at least his due process claims under the Fifth Amendment." *Id.* However, the court also concluded that Al-Aqeel had no standing to raise a Fourth Amendment claim, because the assets blocked were overseas and he was a citizen of Saudi Arabia.

There is arguably a factual dispute over whether Kadi does, indeed, have sufficient connections to the United States, which may hinge on what importance is placed on the assets which have been blocked here. Kadi's complaint does not clearly indicate where his assets have been frozen, and if any of those

assets were located in the United States. Instead, he simply complains generally that his assets have been seized. At the hearing, the Government either could not or would not identify whether Kadi had any assets within the United States that had been blocked or frozen... Kadi also could not enumerate which assets have been, in fact, blocked, although he emphasized that his claim to the \$820,000 "loan" he provided to QLI should be considered an asset...

The administrative record indicates that it is likely that Kadi may have had some property in the United States. Kadi recites several connections to the United States...including the following: (1) he was a director of Global Diamond Resources, a U.S. company, and his shares and ownership interests in the company were frozen and blocked under the Notice of Blocking sent to Kadi "care of" Global Diamond Resources .. and (2) he wired \$820,000 to QLI in 1992, and the proceeds of that transaction had initially been tied up in the civil forfeiture litigation in Illinois. Although Kadi's claim to the \$820,000 at the time of the challenged action is dubious, he does nevertheless claim that he has property interests in the United States that were frozen as a result of the designation.

Ultimately, the issue of standing regarding Kadi's constitutional claims necessarily implicates the validity of OFAC's blocking order on which Kadi's constitutional claims rest. This goes to the merits question of whether the blocking order itself was valid. In those circumstances, if the jurisdictional facts "are inextricably intertwined with the merits of the case," the issue of standing need not be conclusively resolved, but instead the court should "defer its jurisdictional decision until the merits are heard."... Even assuming Kadi does have standing, all of his arguments on the merits of his constitutional claims are nonetheless unavailing for the reasons explained below.

#### B.Fifth Amendment Due Process Claim

Kadi makes a host of arguments in support of his claim that defendants violated his right to due process. Specifically, he contends that defendants failed to give him adequate notice of the charges, or a "thorough statement of reasons" for the decision, adequate time to respond, or an opportunity to cross-examine witnesses or to plead his case before "any independent tribunal".. He also claims that the Government improperly relied on classified evidence without providing him access. These arguments are all unavailing.

The D.C. Circuit in Holy Land Foundation squarely rejected the proposition that due process requires most of the protections requested by Kadi. The court held that notice and a meaningful opportunity to be heard are satisfied by the provision of a post-deprivation administrative remedy and the opportunity to submit written submissions to OFAC, even where (as here) the initial designation provided no notice or opportunity to be heard... The Holy Land Foundation court also stated that there was no automatic right to access classified evidence, to confront and cross-examine witnesses, or to obtain procedures which approximate a judicial trial..

Here, Kadi was provided with even more post-deprivation process than was provided to Holy Land Foundation. Kadi's opportunity to be meaningfully heard is evidenced by the extensive submissions he made to challenge his continued designation. He submitted three lengthy witness statements and

numerous exhibits.. Moreover, Kadi's lawyers had at least four face-to-face meetings with OFAC over the 2002-2003 time frame.. OFAC also sent Kadi a five-page letter with detailed questions about twelve continued areas of concern — "the answers to which will help us issue a determination on the petition." . Kadi provided a forty-one page response to the questionnaire.. He also availed himself of the opportunity to rebut the evidence he considered erroneous, including the allegations in the Wright affidavit regarding Kadi's involvement with QLI and the Illinois land deal, sources cited in the two-page fax, and newspaper articles referred to in the record. Accordingly, even if he did not receive the full unclassified administrative record prior to the March 2004 decision, he did receive an opportunity, in substance, to rebut the evidence found in the unclassified administrative record through his own submissions to OFAC, as well as the opportunity to respond robustly to OFAC's follow-up questions addressing previous statements Kadi had made and identifying specific facts and areas of concern relevant to the designation decision. This case is unlike *People's Mojahedin Org. of Iran v. U.S. Dep't of State*., where the court expressed concern that it was unable to discern what facts were relied on and what conclusions Treasury had drawn from the record to support the FTO re-designation. There is no such confusion here. The March 2004 OFAC Memorandum and the administrative record, including the back and forth exchanges with Kadi, show that OFAC considered all of Kadi's submissions and explained its assessment of the evidence. Therefore, it is clear that the requirements of due process were satisfied.

#### C.Fifth Amendment - Takings Claim

Kadi next contends that OFAC's freezing of his assets has deprived him of use of his property, and that the deprivation is "permanent" because "[t]he provisions of IEEPA, E.O. 13,224, and the implementing regulations provide no mechanism for Mr. Kadi to further contest his designation or the blocking of his assets.".. As a threshold matter, the allegation that there is no "mechanism . . . to further contest his designation" is untrue. OFAC provides for a reconsideration process that Kadi, in fact, used.

In any event, courts in this jurisdiction that have considered similar "takings" challenges under the Fifth Amendment have rejected them.

Even if the Notice of Blocking constituted a "taking," pursuant to the Tucker Act jurisdiction would rest in the Court of Federal Claims, not here... Kadi characterizes his claim as not being subject to the Tucker Act because he does not seek money damages.. But that characterization is contradicted by his complaint, which labels Count Three as a "Right to Just Compensation.".. Moreover, the Seventh Circuit has suggested that "just compensation" is the only remedy available for a takings violation.

Accordingly, the Court lacks jurisdiction to resolve Kadi's takings claim. And, even if the Court had jurisdiction, the Court agrees with other courts that have found that the blocking of assets does not constitute a taking under the Fifth Amendment.

#### D.First Amendment - Speech and Association

Kadi claims that the SDGT designation and blocking order substantially interfere with his rights to freedom of speech and freedom of association. He contends that his designation prohibits him from

making humanitarian contributions to "legitimate charitable organizations" and states that he "does not have a knowing affiliation with any terrorist group or individual including Osama Bin Laden or Al-Qaeda . . . and does not have a specific intent to further the illegal aims of any terrorist group or individual." . As previously stated, it is doubtful that Kadi, as a non-resident alien with unclear ties to the United States, can even raise a challenge to OFAC's action under the First Amendment. But assuming he could, his First Amendment claims fail....

Because money is fungible, even allowing for good-intentioned financial support to organizations and individuals involved in terrorism would be problematic, as organizations could free up other resources to be used towards violent terrorist objectives.. In addition, EO 13,224 and the implementing regulations construct a regime that provides for the listing of a limited number of SDGTs, permits entities and individuals to contest their designations, and allows the Government to delist individuals and entities and remove their SDGT designations. ..This carefully constructed government regime for designating SDGTs, which takes into consideration the concerns regarding the fungibility of money and resources described above, satisfies the "narrowly tailored" prong of the strict scrutiny test.

## 2. Freedom of Association

Kadi's freedom of association claim fares no better. The Government contends that Kadi's designation was not based on mere membership, but instead was based on his financial support of terrorist groups.. Kadi responds that he "is completely prohibited from making contributions, and thus barred from engaging in a critical form of associational activity.". He also argues that such a prohibition cannot be sustained "in the absence of a specific intent to further the organization's unlawful ends."

This Circuit comprehensively addressed this issue in *Islamic American Relief Agency*, and held that a SDGT blocking order does not violate freedom of association because it does not prohibit associational activity; rather, it targets the financial support of terrorism.... So, too, here Kadi was designated primarily on the basis that he provided funding to terrorist organizations. Hence, his First Amendment freedom of association claim is foreclosed.

## E.Fourth Amendment

Kadi claims that freezing or blocking his assets "constitute[s] an unreasonable search and seizure without probable cause.". He alleges that "[d]efendants initially froze or blocked [Kadi's] assets in October 2001, without reasonable suspicion, probable cause or warrant and without specifying their reasons for doing so.". He further asserts that "[d]efendants continue to freeze or block [Kadi's] assets without providing him with the information in the administrative record upon which OFAC made its determination that [Kadi] is a 'terrorist,' any summary of the allegedly 'classified' information, or any specification of any charges against him to which he might have responded." .

Defendants argue that the Fourth Amendment is inapplicable to blocking and seizure orders of this nature. They also contend that "blocking actions pursuant to E.O. 13224 are per se reasonable under the Fourth Amendment and thus should not be subject to a 'probable cause' standard or warrant requirement."



Defs.' Mot. at 45. Finally, defendants argue that blocking actions fall under the "special needs" exception to the warrant and probable cause requirements.

As discussed above, subsequent to the initial briefing in this case *Al Haramain III* was decided by the Ninth Circuit. *Al Haramain III* found in relevant part that the Government had violated the Fourth Amendment rights of *Al Haramain Islamic Foundation, Oregon* ("AHIF-Oregon"). There, the Government had also argued that the special needs exception to the warrant and probable cause requirement under the Fourth Amendment applied, and that the blocking orders, in any event, were per se reasonable. The Ninth Circuit rejected those arguments, and concluded that OFAC violated AHIF-Oregon's Fourth Amendment right to be free of unreasonable seizures... The court reasoned that the exigent circumstances exception to the Fourth Amendment's warrant requirement may have applied to the initial designation and blocking, but once the Government had blocked the assets to foreclose any asset flight concerns, it could have obtained a warrant with respect to the specific assets identified. ..The court rejected the Government's argument (also raised here) that obtaining warrants would be unduly burdensome or impractical.

The Government urges this Court not to follow the Ninth Circuit's decision in *Al Haramain III*, but instead to adopt the approach of other district courts in this jurisdiction in finding that blockings of this nature do not constitute seizures... This Court .. has expressed some reluctance to find that, categorically, blocking orders could never be "seizures" under the Fourth Amendment..

However, the Court need not resolve the issue, nor need it decide as a general matter whether blocking orders categorically fall within one of the enumerated exceptions to the Fourth Amendment warrant requirement. Even assuming that the blocking order at issue here constituted a "seizure," having already concluded above that OFAC's decision to maintain the SDGT designation of Kadi was supported by substantial evidence, it follows that the blocking order was not issued unreasonably or without probable cause. Indeed, the courts in *Islamic American Relief Agency* and *Holy Land Foundation* concluded that because the Government had the authority to issue the blocking order under IEEPA and EO 13,224, and because the courts had already determined in each instance that OFAC's decision to issue a blocking order was not arbitrary and capricious, the plaintiffs in those cases could not state a cognizable Fourth Amendment claim.... So, too, here, the Court has concluded that substantial evidence in the administrative record supports OFAC's decision to block Kadi's assets; hence, there was no Fourth Amendment violation, either at the time of the initial blocking or as a result of the denial of reconsideration in March 2004.

*Al Haramain III* is actually consistent with this ruling. The Ninth Circuit balanced the interests of a domestic organization to be free from blocking orders, and reasoned that "the number of designated persons located within the United States appears to be very small. The warrant requirement will therefore be relevant in only a few cases."... The court, in fact, explicitly stated: "We address only the facts of this case: OFAC's seizure of assets of a United States entity located within the United States. We do not address the requirements under the Fourth Amendment for other situations including, for example, designations of foreign entities or designations by executive order." Here, of course, a foreign

entity/individual was designated pursuant to EO 13,224. Given these limitations as stated by the Ninth Circuit, confining its holding to circumstances not present in this case, Kadi's reliance on Al Haramain III is unpersuasive.

Moreover, the Government's concerns about the practicability of obtaining warrants seem well-founded... Given the concerns raised by the Government in securing warrants, this Court would be reluctant to apply Al Haramain III to the present situation, where the designated person is a foreign national, with significant overseas ties and assets. For all these reasons, Kadi's Fourth Amendment claim will be denied.

#### F. Vagueness and Overbreadth

In Counts Six and Seven, Kadi asserts that the SDGT designation violated his First and Fifth Amendment rights because the designation criteria are unconstitutionally vague and overbroad, both on their face and as applied to him individually.. Count Six maintains that the EO 13,224 criterion "otherwise associated with" other designated persons or entities allows designation "without regard to the character or intent of the association or support.". Kadi contends that his Count Six challenge to "otherwise associated with" encompasses a challenge to the terms "material support" and "services," which are incorporated by reference into the definition of "otherwise associated with".. Count Seven asserts that IEEPA, EO 13,224, and the implementing regulations suffer from vagueness and overbreadth flaws "because they do not define such critical terms as 'terrorist organization', 'specially designated global terrorist' or 'any other term related to terrorism'". The complaint does not indicate which specific provision of IEEPA Kadi is challenging here. Presumably, he challenges the language in Sections 1(c) and (d) of EO 13,224, which authorize the designation of persons who provide various kinds of support for "acts of terrorism." The regulatory language at issue is apparently in 31 C.F.R. § 594.310, which defines a SDGT as "any foreign person or persons listed in the Annex or designated pursuant to Executive Order 13224 of September 23, 2001."

The Supreme Court has instructed that a statute is unconstitutionally overbroad only where the overbreadth is "substantial . . . relative to the statute's plainly legitimate sweep." *United States v. Williams*, (2008). Moreover, "[i]nvalidation for overbreadth is 'strong medicine' that is not to be casually employed."... A law that does not reach constitutionally protected conduct, and therefore passes muster under the overbreadth test, may still be challenged on grounds that it is unduly vague in violation of due process... However, a law is unconstitutionally vague on its face only if it is "impermissibly vague in all its applications." The Supreme Court has instructed that laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."... Laws must also "provide explicit standards for those who apply them" to prevent "arbitrary and discriminatory enforcement." "[G]reater tolerance" is given to "enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.".. If, however, a law threatens to inhibit the exercise of constitutionally protected rights, such as the right of free speech or of association, then "a more stringent vagueness test should apply.". But, still, a plaintiff who "engages in some conduct

that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

Although Kadi's complaint mounts both vagueness and overbreadth challenges to IEEPA and EO 13,224, he focuses on vagueness and does not really address the overbreadth claims, nor does he respond to the Government's arguments on overbreadth. Hence, the Court will focus here on Kadi's vagueness arguments as well. Even if Kadi had developed his overbreadth arguments, his claim would fail because IEEPA and EO 13,224 have a plainly legitimate sweep — to prevent terrorist attacks by foreclosing financial and other support to terrorists and terrorist organizations...

#### 1. "Otherwise Associated With"

Kadi argues that the provision of EO 13,224 allowing designation on the basis that one is "otherwise associated with" another SDGT is impermissibly vague because it "could encompass First Amendment protected speech and association.". He contends that EO 13,224 permits persons who have never engaged in or supported terrorism or terrorist acts to be designated based on mere "association" with or "support" of a SDGT. The Government, for its part, responds that Kadi's challenge has been mooted by the new definition of "otherwise associated with" at 31 C.F.R. § 594.316(b).<sup>24</sup> Kadi counters that OFAC's 2007 definition of "otherwise associated with" had not been promulgated at the time of Kadi's designation. . In addition, although Kadi acknowledges that the term "otherwise associated with" has been subsequently defined in the regulations, he maintains that the newly defined phrase remains constitutionally infirm because the terms incorporated within the new definition — specifically, "material support" and "services" — are themselves impermissibly vague because no showing of knowledge or intent that the support or services were directed to a designated entity is required..

Kadi's challenge to the term "otherwise associated with" — including the incorporated terms "material support" and "services" — fails. As an initial matter, Kadi cannot bring a facial vagueness challenge to these terms because the basis for his designation was his financial support to other SDGTs — conduct that is "clearly proscribed" under the law... But even if he could raise a facial challenge to EO 13,224, the newly defined term, promulgated at 31 C.F.R. § 594.316(b), remedies any deficiencies that might have existed. The term "otherwise associated with" is now defined to mean:

(a) [t]o own or control; or

(b) [t]o attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to.

The district court in *Kindhearts I* rejected a similar challenge in the context of EO 13,224 and the implementing regulations relating to the designation of SDGTs.. That court reasoned that the phrase "otherwise associated with" had been clarified by the newly adopted definition and, in any event, limited any applicability the phrase might have to protected speech and conduct.. It further stated that neither "material support" nor "services" as used in the definition of "otherwise associated with" rendered the term unconstitutionally vague. Moreover, in rejecting an attack on "material support" and its underlying terms on vagueness grounds, the Supreme Court in *Humanitarian Law Project IV* reasoned that "a person

of ordinary intelligence would understand the term 'service' to cover [the activities] performed in coordination with, or at the direction of, a foreign terrorist organization." The courts that have addressed vagueness and overbreadth challenges to the term "otherwise associated with" have ultimately rejected them. S

The case is even more compelling here, where Kadi's conduct involves providing financial support to designated entities and individuals. .. Although Kadi claims that basing a designation on being "otherwise associated with" other SDGTs could include First Amendment protected speech and association and that "services" could encompass activities that are pure speech or advocacy, no such activities are at issue here. As previously discussed, it is clear from Kadi's complaint that he does not claim that he has sought to engage in those kinds of activities, but was foreclosed or chilled from doing so. As the Government points out, the term "otherwise associated with" applies to specific types of conduct beyond mere association, and the basis for Kadi's designation is focused on the provision of financial support to SDGTs and terrorist organizations. Hence, his vagueness challenge to the term "otherwise associated with" cannot succeed.

## 2. "SDGT," "Terrorist Organization," and "Any Other Term Related to Terrorism"

Kadi's challenges on vagueness grounds to the terms "SDGT," "terrorist organization" and, as a catch-all, "any other term related to terrorism" are even more attenuated. He argues that the IEEPA, EO 13,224, and the implementing regulations are vague both on their face and as applied to him, because they fail to define these terms.. His challenge is unpersuasive.

Kadi is wrong that the regulations fail to define these terms. ...Moreover, Kadi's argument that the Court should find impermissibly vague "any other term related to terrorism" casts too wide a net for the Court to seriously consider it. Kadi responds that the definition of SDGT.. does not cure the vagueness problem because it is circuitous and self-referential — that is, "the only way to know with certainty what qualifies as a [SDGT] is for OFAC to designate an individual or entity as an SDGT.". But Kadi's contention identifies no deficiency in the definition, and at least one court has rejected a similar argument... Accordingly, this vagueness challenge fails as well.....

In December 2012 the Federal Reserve announced “the issuance of a consent order to cease and desist and a civil money penalty assessment of \$100 million against **Standard Chartered PLC**, London, Standard Chartered Bank, London, and the bank's branch in New York.” The consent order related to Standard Chartered’s compliance failures with respect to economic sanctions and anti-money-laundering requirements and failures to respond to bank examiner questions.<sup>11</sup> The

---

<sup>11</sup> Federal Reserve Press Release (Dec. 10, 2012) at <http://www.federalreserve.gov/newsevents/press/enforcement/20121210a.htm>.

order required the bank to improve its compliance program. At the same time, Standard Chartered entered into deferred prosecution agreements with the DOJ and the District Attorney for New York County,<sup>12</sup> and a settlement agreement with the Treasury's Office of Foreign Assets Control.<sup>13</sup> I will assign reading with respect to these actions separately.

On 21 March 2013 John Peace, the Chairman of Standard Chartered made the following statement:

On 5 March 2013, I, together with Chief Executive Officer Peter Sands and Group Finance Director Richard Meddings, representing Standard Chartered Bank (the "Group"), held a press conference where certain questions were asked concerning individual employee conduct and compensation in light of the deferred prosecution agreements made with the US Department of Justice and the New York County District Attorney's Office in December 2012. During that press conference, which took place via phone, I made certain statements that I very much regret and that were at best inaccurate.

In particular, I made the following statements in reference to a question regarding the reduction of bonuses for SCB executives:

We had no willful act to avoid sanctions; you know, mistakes are made - clerical errors - and we talked about last year a number of transactions which clearly were clerical errors or mistakes that were made... My statement that SCB "had no willful act to avoid sanctions" was wrong, and directly contradicts SCB's acceptance of responsibility in the deferred prosecution agreement and accompanying factual statement. Standard Chartered Bank, together with me, Mr. Peter Sands and Mr. Richard Meddings, who jointly hosted the press conference, retract the comment I made as both legally and factually incorrect. To be clear, Standard Chartered Bank unequivocally acknowledges and accepts responsibility, on behalf of the Bank and its employees, for past knowing and willful criminal conduct in violating US economic sanctions laws and regulations, and related New York criminal laws, as set out in the deferred prosecution agreement. I, Mr. Sands, Mr. Meddings, and Standard Chartered Bank apologize for the statements I made to the contrary.<sup>14</sup>

---

<sup>12</sup> Department of Justice, Standard Chartered Bank Agrees to Forfeit \$227 Million for Illegal Transactions with Iran, Sudan, Libya, and Burma (Dec. 10, 2012) at <http://www.justice.gov/opa/pr/2012/December/12-crm-1467.html> .

<sup>13</sup> The settlement agreement is at [http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121210\\_SCB\\_Settlement.pdf](http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121210_SCB_Settlement.pdf).

<sup>14</sup> See <http://investors.standardchartered.com/en/releasedetail.cfm?ReleaseID=750004>